No. 200,521-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

JEFFREY G. POOLE,
Attorney at Law

Bar Number 15578

OPENING BRIEF OF RESPONDENT POOLE

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I. INTRODUCTION

The heart of this appeal centers on three disturbing matters:

First, a Hearing Officer's findings of fact in the "alternative" in which she admitted she could not determine which set of facts were proven yet still used them to support her conclusions that Mr. Poole violated the RPCs. Her "alternative findings" were of irreconcilable material facts upon which the findings depended.

Second, the Board overturned the Hearing Office and found that Mr. Poole's personal and emotional problems "substantially contributed" to the alleged misconduct as yet failed to apply this significant mitigator without explanation or analysis.

Third, that Mr. Poole's assertion of objections by himself and though his counsel to an overly broad and intrusive request for documents in an audit (despite the Bar's refusal of offers to have a third party resolve the issue and instead filing grievance and then a petition for interim suspension) constituted "non cooperation" and "caused harm" to the legal system When a defendant legitimately "defends" himself or herself in a proceeding, does "harm" then result to the legal system?

II. ASSIGNMENTS OF ERROR

1. The Board erred when it adopted the recommended sanction of a one-year suspension.

2. The Board erred when it failed to dismiss the grievance.

3. The Board erred when it adopted the findings of fact, conclusions of law and recommendations found a the Hearing Officer's Findings of Fact 8, 11, 17, 20, 21, 23, 25, 26, 27, 30, 54 and 55 when they were not supported by the evidence or law.

4. The Board erred when it adopted the hearing officer's determination at paragraph 70 that the WSBA had properly met the circumstantial evidence test and in doing so rejecting portions of Mr. Poole's defenses.

5. The Board erred when it adopted alternative findings of fact found at paragraphs 9, 31, 56 and 59.

6. The Board erred when it failed to determine that Mr. Poole had legitimate and good faith reasons to object to the overbroad production request for SO billing information.

7. The Board erred when it adopted Conclusions of Law and Recommendation paragraphs 71, 72, 74, 76, 77, 85, 86, 89, portions of 90, portions of 91 and the recommended sanction where such findings are not supported by the evidence and the law.

8. The Board erred when it failed to properly apply and use the ABA Sanctions Standards including proper use of a significant mitigator as well as considering proportionality resulting in the reduction of the presumptive sanction to a 45-day suspension or a reprimand or an admonition.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board commit error when it recommended a one-year suspension? (Assignment of Error # 1.)

2. Did the Board commit error when it failed to dismiss the grievance based on the totality of the evidence and law? (Assignment of Error # 2.)

3. Did the commit error when it failed to reduce the sanction to a 45-day suspension or a reprimand or an admonition. (Assignment of Error # 8.)

4. Did the Board commit error when it failed to determine that certain disputed findings of fact were not supported by substantial evidence? (Assignment of Error # 3.)

5. Did the Board commit error when it failed to determine the Bar's use of circumstantial evidence to show Mr. Poole's action did not disprove other reasonable conclusions which could be drawn from the same evidence? (Assignment of Error # 4.)

6. Did the Board commit error when if failed to strike and then considered alternative findings of fact entered by the hearing officer? (Assignment of Error # 5.)

7. Did the Board commit error when it failed to find that Mr. Poole had a reasonable basis to object to the overbroad production request in the SO matter? (Assignment of Error # 6.)

8. Did the Board commit error when it failed to dismiss the grievance because of a lack of proof or supporting law? (Assignment of Errors # 2, 3, 4, 5 and 7.)

9. Did the Board commit error when it failed to properly apply the ABA Sanctions Standards? (Assignment of Errors # 8)

10. Did the Board commit error when it applied ABA Standard 6.0 when the injury element required of that Standard was not shown? (Assignment of Error # 8.)

11. Did the Board commit error when it used ABA Standard 7.2 when the appropriate the Standard was 7.3? (Assignment of Error # 8.)

12. Did the Board commit error when used a "knowing" state of mind determination when a "negligence" state of mind was the appropriate determination? (Assignment of Error # 8.)

13. Did the Board commit error when it determined which injury element of the Standards applied? (Assignment of Error # 9.)

14. Did the Board commit error when it found the aggravator of dishonest or selfish motive and pattern of misconduct? (Assignment of Error # 8.)

15. Did the Board commit error when it failed to properly balance the aggravators and mitigators and when it failed to apply the significant mitigator of personal or emotional problems to significantly reduce the sanction? (Assignment of Error # 8.)

16. Did the Board commit error when it recommended a one-year suspension in view of proportional cases showing a lesser sanction was appropriate? (Assignment of Error # 8.)

IV. STATEMENT OF CASE

A. Factual Background

Respondent Jeffrey G. Poole was admitted to the Washington State Bar Association (WSBA) in 1986. There are three prior disciplinary matters involving Mr. Poole relevant to this pending case: the Matson Grievance, the Trust Account Case and the Moore Grievance. RFFCLR 1 and 3.[1]

[1] Respondent refers to the Hearing Officer's Revised Findings of Fact, Conclusions of Law and Recommendation as "RFFCLR".

(1) Production of Billing Records

In March 2003 the WSBA began investigating Mr. Poole in the Moore Grievance concerning invoices billing for work done six months prior to the date of the invoices. The hearing officer in Moore concluded that mistakes were made on the invoices but that there had been no violation of the RPCs and dismissed the grievance in January 2005. RFFCLR 6; Respondent's Ex. No. 112 (Moore Decision - Appendix C).

As part of the Moore investigation, on July 24, 2003, the Office of Disciplinary Counsel (ODC) issued a letter to Mr. Poole requesting 2002 billing statements which contained (i) charges for work performed prior to 2001 and (ii) charges for work performed in 2001 where the work was performed more than six-months prior to the billing. Mr. Poole believed that the request only required him to produce billings which had actually been sent to clients. He focused his review of records on a January 24, 2002, billing because he understood that was the origin of the billing problems in which older time was posted to the billings. He believed (based on his experience with lien law) that he was to look for work posted on the January 24, 2002, billing for work done prior to June 2001. RP 701-703. He then tried to determine which clients were active in 2002 and 2003. He checked his billing files for those clients. The billing files are where copies of client's bills are supposed to be kept but it is not a perfect system. RP 705-706. He did not check his computer records

because the request was for billings that had gone out, which were supposed to be in the billing files. The computer records were not an accurate record of what was actually mailed to the clients. RP 708-709. When he found a billing that seemed responsive he did not look for further billings for that client. (GB[2] - RP 799- 800). He did not check in any other locations other than the billing file cabinet. There were files not located in the billing file cabinet which he did not locate, such as files receiving special treatment (SO - RP 793-795) or files pulled for collection (JJ and Kennedy – RP 798; 795- 797). He provided the WSBA all bills he believed to be responsive to the July 24, 2003, ODC request. RP 709.

In its investigation in this case the WSBA reviewed additional computer billing records and attempted to admit them at the hearing to show that these were billings which also should have been produced in Moore. Ex 14. However, the hearing officer concluded that these records were inconclusive as to whether or not they had been sent to clients. RFFCLR 15 and 16. She stated she was unable to identify or quantify which billings had been sent to clients, yet still surmised that some of the billings in Ex. 14 were sent to clients and were responsive to the July 24, 2003 Moore request. RFFCLR 17.

The Bar also located various hard copies of bills in Mr. Poole's billing files that had not been provided in response to the July 24, 2003,

[2] To protect client confidences initials were used at the hearing for clients who did not testify – these are GB, SO, JJ, and JG.

request. Ex. 15. The WSBA did not prove that these bills were in the billing files at the time Mr. Poole reviewed them. Mr. Poole testified that they might not have been. RP 721. The WSBA produced no clients identified in the Ex. 15 bills to testify that they had actually received these billings. The only proof the WSBA offered that they were mailed to clients was that they were found in the billing files and Mr. Poole's equivocal testimony that if it was in the billing file "it probably was sent." It was clear that all bills in the billing file were not mailed. For example, the JG bill which was in the billing file marked "hold." The Hearing Officer specifically found that even though this was in the billing file the JG bill was not sent. Ex. 15, Bates Stamp 000313, RFFCLR 21.

Prior to this hearing Mr. Poole conducted an extensive review of the billings contained in Ex. 15. He then testified in detail about of these each billing, discussed whether or not he considered each to have fallen within the six-month time frame of the request and whether or not it the bill been sent. RP 723–728; 766–783. He acknowledged that it was certainly possible that in reviewing the billings in response to the Moore request that he had missed some. RP 783-784.

Despite the facts that: (1) the record shows not all the billings in Ex. 15 were in sent to clients; (2) the lack of proof from any clients that they had received such billings; and (3) Mr. Poole's explanations about the

billings, the hearing officer somehow found that while the JG billing in Ex. 15 had not been mailed, the other 15 billings had been. RFFCLR 23.

The hearing officer also found that other billings fell within the scope of the July 24, 2003, request. One was the billing to JJ, Ex. 12, which Mr. Poole had himself provided as part of the records in another matter in May 2005. RP 61. Mr. Poole acknowledged that it fell within the request of the July 24, 2003, letter but testified that he had not located it because it was not kept with the billing files since it was in collection status. RP 798. Another billing was the Kennedy billing, Ex. 14, page 120. This billing was not discovered at the time Mr. Poole reviewed documents in response to the July 24, 2003, request since it was being held separately from the other billing files pending collection. RP 795- 797. There were also three GB billing which he had provided at the Matson hearing. Ex 13. In response to the July 24, 2003, request Mr. Poole had provided one GB billing that was responsive. At the time he also sent a correcting billing to GB. He did not initially locate the additional GB billings because once he located the one for January 24, 2002, he stopped looking, thinking he had found the relevant billing. RP 799- 800. The hearing officer found that Mr. Poole had not produced 7 billings in connection with the SO file. RFFCLR 23. Mr. Poole explained that the SO billing files were treated separately and were not kept with the other billing files so he missed them in his

review and, furthermore, at the time of the request any billing issue had been resolved directly with the client. RP 668-671; 793-794.

(2) The SO Billing File

As a result of the Trust Account Case, Mr. Poole was required to cooperate with periodic audits of his trust account. On April 20, 2004, the auditor asked Mr. Poole for information regarding the SO billing and asked for the entire SO billing file. Ex. 17. Mr. Poole immediately responded in writing through his counsel on April 22, 2004, stating that "I do not see how the [request for the entire] file relates to the issues of whether or not Mr. Poole has been properly keeping his trust account." Ex. 18. The auditor responded on April 26, 2004, setting forth her reasons and asking for any objections to be noted. Ex. 19.

Mr. Poole promptly provided a response on May 5, 2004, addressing the specific issues raised by the auditor. Ex. 20. He believed that the objection noted by his counsel's letter of April 22, 2004, provided the objection to the issue of producing the entire billing file but addressed the specific concerns of the auditor on audit issues. RP 674-675. On May 20, 2004, the ODC asked for the entire SO file and, while acknowledging an awareness of the objection raised by Mr. Poole's counsel, nonetheless asserted that no objection had been filed after the auditor's April 26, 2004, letter. Ex. 21.

In the interim, Mr. Poole voluntarily provided a number of SO bills that specifically responded to and answered the auditor's questions regarding the amount of the SO bill and the trust funds RP 677; 686-690. The WSBA auditor testified that Mr. Poole promptly and completely responded to every request made during the audit period. RP 453-454.

No response was sent by Mr. Poole at that time and the WSBA did not send a "ten-day letter." Instead, 18 days later, on June 7, 2004, the ODC sent a letter threatening to open a grievance file if the entire SO billing file was not produced. A response was provided by Mr. Poole's counsel via e-mail on June 18, 2004, specifically objecting to the request.

> On the SO billing file – Mr. Poole has your letter about your file. He has provided an explanation of what happened which explains the trust account entries. This process is supposed to be one for making sure he is keeping his books right. He has demonstrated that. **His concern is that this can be an excuse to intrusively review of any or all of his files. That was not the purpose of the audit.** Perhaps there is a resolution of him providing discrete portions of the file. If so, what would the auditor require in order to verify her audit issues?
>
> **Mr. Poole** is not being uncooperative but **feels the audit may be going beyond its intended scope**. If we cannot resolve the issue do you think that we take it back in front of Mr. Curran to review the scope of his audit decision?

Ex. 24, (Emphasis added). The hearing officer characterizes this as a discussion of the forum to resolve the issue, RFFCLR 28, but it is a clear expression of Mr. Poole's objection to the request as being intrusive and

beyond the scope of the requirements of the probationary audit. He also offered two ways to resolve the issue, providing discrete portions of the file in response to the specific needs of the auditor or to take the issue to the person who had ordered the audits in the first place.

Mr. Poole had expressly objected to the request for the full SO billing file on two occasions: (1) in his April 22, 2004 letter; and, (2) his June 18, 2004 E-mail. All parties knew what the issue was – the Association wanted the entire file and Mr. Poole objected to provide the entire file on the basis that the request was intrusive and overreaching. He did provide those portions which were responsive to the questions the auditor asked before a grievance was filed. RP 677; 686-690.

The Association responded by E-mail on June 22, 2004, stating that "It does not appear that we can resolve the question," that Mr. Curran lacked jurisdiction and asserted that "The ELC appear to contemplate the pursuit of a separate grievance regarding such a matter." Ex. 25. It is apparent that the WSBA understood Mr. Poole's objection and while not agreeing with it refused to take Mr. Poole up on his offer to submit discrete portions of the file or to submit the question to the hearing officer who had ordered the audit in the first place. Instead the Association took the hostile and uncompromising position that it would only address resolution of the objections through the filing of a separate grievance.

The WSBA then opened a grievance. Ex 27. Respondent did not respond, since everyone knew he had objected and that he was waiting for the matter to progress so he would have an opportunity to contest the request as he had been proposed to the WSBA. Mr. Poole was represented by counsel in this matter. RP 679-687. Each side knew that it was going to take some formal setting to present the issues for resolution. It was necessary to go through some pro forma steps to get to the stage where the issue could be submitted for review by an outside decision maker. One such step was the issuance of a 10-day letter, which occurred. Ex. 28. This was followed up by a deposition. Ex. 31.

At the deposition Mr. Poole stated twice that he was not producing the entire file because the request was "intrusive" and overly burdensome. Ex 31, pg. 39-40. The hearing officer found that these objections had been raised for the first time at his deposition and that his objections were only that the file was too large RFFCLR 30. Mr. Poole disputes this. Mr. Poole, through his counsel, had specifically objected twice before about the scope and intrusive nature of the request. He had offered to resolve his objections through Mr. Curran but he was rebuffed. Everyone knew that the point of the grievance, in the words of the ODC was to "resolve the question.... [t]he ELC appears to contemplate the pursuit of a separate grievance regarding such a matter." Ex. 25. At his deposition Mr. Poole then renewed his prior objections in the hopes of moving the matter

forward to resolution by an outside decision maker. He had already produced documents he felt sufficiently answered the auditors questions.

At the September 15, 2004 Deposition, the ODC stated it was going to seek an interim suspension. Exs 31;105, pg 000006. The next day Mr. Poole immediately moved for a protective order before the Disciplinary Board in another good faith attempt to resolve the dispute over the scope of the request. He asserted in his motion that the Association was asking for "overbroad and unreasonable access to Mr. Poole's files" and that he was seeking a limit on the scope of the Association's inquiry since it was an invasion of privacy, denial of due process and was an unreasonable search and seizure. Ex. 105, pg. 000007. Despite these facts, the hearing officer found that the basis for his motion was that the "file consists of several volumes and covering many years." RFFCLR 30.

The Association then refused to permit resolution by the Board and instead immediately filed a petition motion for interim suspension. Ex. 33. At the same time it argued to the Board that it lacked jurisdiction. The Board Chair agreed and Mr. Poole's motion was not considered. Ex. 108. At this point the ODC had refused to permit submission of discrete portions of the file or to have the matter considered in by any forum place except in front of this Supreme Court, which the WSBA knew at that time was considering Mr. Poole's appeal in the Matson Grievance. The Bar's

refusal to allow review short of the Supreme Court left Mr. Poole having to weigh the relative merits of having his position regarding the SO files considered at the same time the court was reviewing another matter of his, as well as the risk of a possible suspension if he did not succeed. In the face of possible prejudice and risk he decided to withdraw his objections and provided what he had. RP 583-587; 697-699. He was only able to locate Volume 3 of the SO billing file, which he produced in its entirety.

The hearing officer concluded that when Mr. Poole provided Volume 3 his objections at the deposition were either unfounded or he improperly withheld Volumes 1 and 2. RFFCLR 31. Mr. Poole's objections, raised before the deposition and then again at the deposition, were that the request was intrusive and beyond the scope of the audit. Mr. Poole provided a sworn statement that he could not find Volumes 1 and 2, a fact never challenged by the Association. Ex 109. The WSBA had not charged Mr. Poole with acting improperly in connection with Volumes 1 and 2. When the Disciplinary Board considered the hearing officer's various determinations regarding Volumes 1 and 2 in RFFCLR 90, it struck this portion of the finding because it was never charged and because Mr. Poole did not have notice or an opportunity to challenge such finding. The Board found the issues of Volume 1 and 2 were "not the subject of testimony at the hearing." Board's Decision, Appendix A.

At the hearing both Mr. Poole and the WSBA called qualified medical experts to testify as to Mr. Poole's medical condition at the time of the production requests. Both experts testified that Mr. Poole suffers from Bipolar I. RP 863; 942. The WSBA's physician testified that Mr. Poole's disorders "substantially contributed to the misconduct alleged" after concluding her IME, as did Mr. Poole's treating physician, Dr. Robert Reichler. RP 982; 871-877. Despite the having the same opinions from both physicians, the hearing officer found that Mr. Poole had not proven the ABA Standards mitigator of personal or emotional problems. The Board reversed this determination and, as discussed more fully below, found that Mr. Poole personal and emotional problems "substantially contributed to the alleged misconduct." App. A.

B. Procedural History

The Association charged Mr. Poole with 11 counts of misconduct in an Amended Formal Complaint. Counts 1, 2, 3, 4 and 5 asserted various allegation of failing to promptly comply with requests for information in violation of RPC 8.4(c) (dishonesty for allegedly knowingly failing to provide a complete response); ELC 5.3(e) (failing to promptly comply with requests for information; and ELC 13.8 (failure to comply with terms of probation). Counts 6, 7, and 8 related to trust account and billing issues under RPC 1.14. Count 9 dealt with the alleged failure to pay Bar auditing costs pursuant to ELC 13.8. Count 10 alleged disbursement of funds

before they cleared the banking system in violation of RPC 1.14(a). Count 11 alleged improper processing of credit card payments in violation of RPC 1.14(a).

The hearing officer entered Revised Findings of Fact, Conclusions of Law and Recommendation (RFFCLR). CP Decisions Papers, BF 54, page 32, (Also attached as Appendix B). She found knowing violations of Counts 1, 2, 3, 4, 5 and 10; and negligent violations of Counts 6, 7 and 8. She dismissed Counts 9 and 11. She found that suspension under ABA Standard 6.12 and 7.2 was the presumptive sanction for Counts 1, 2, 3, 4 and 5. She recommended a reprimand for Count 10 under Standard 8.3 and an admonition for Counts 6, 7 and 8 under Standards 4.14 and 4.64. She found six aggravating factors – prior disciplinary offences, dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct and substantial experience in the practice of law. She rejected the mitigator of personal or emotional problems and remorse. She recommended a suspension from the practice of law for one year with two years of probation during which audits would be conducted.

Mr. Poole challenged the suspension recommendation to the Board. He challenged findings of fact paragraphs 8 through 12, 15, 17, 20, 21, 23, 25, 26, 27, 30, 31, 32, 54- 61 and 65. He challenged conclusions of law paragraphs 70-72 and 74-77 and the sanctions analysis paragraphs 85,

86, and 89. He contested the aggravating factors found at paragraph 90 of "Dishonest or Selfish Motive" and "Pattern of Misconduct." He contested the failure to find the mitigator of personal or emotional problems, paragraph 91. Mr. Poole contested the recommendation of suspension.

The Disciplinary Board deleted a section of paragraph 90 relating to aggravators relating to whether Mr. Poole had acted improperly in regard to Vol. 1 and 2 of the SO billings. It also found that testimony by the two physicians proved that personal and emotional problems "substantially contributed" to the alleged misconduct. The Board did not engage in any analysis of the whether this new determination of a significant mitigator which "substantially" contributed to the alleged misconduct should result in a reduction from the presumptive sanction. The Board adopted the hearing officer's suspension recommendation and added that during the probation period Mr. Poole needed to continue treatment for his bi-polar disorder by a vote of 7-2,. CP Decisions Papers, BF 66 and 67, pages 59 through 65, (Also attached as Appendix A.)

Mr. Poole timely filed an appeal and brings this matter before the court for consideration. CP Decisions Papers, BF 69, page 66.

V. ARGUMENT

A. Standard for Review

The standard for review before this court in an attorney disciplinary matter is generally established law and was recently summarized in *In re*

Disciplinary Proceeding Against Marshal, 160 Wn.2d 317, 330, 157 P.3d 859 (2007):

> This court bears the ultimate responsibility for lawyer discipline in Washington. *In re Disciplinary Proceeding Against Cohen* (*Cohen* II), 150 Wn.2d 744, 753-54, 82 P.3d 224 (2004). However, we give considerable weight to the hearing officer's findings of fact. *E.g.*, *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 717, 72 P.3d 173 (2003). Unchallenged findings of fact are treated as verities on appeal. *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 735, 122 P.3d 710 (2005). Where challenged, we will uphold the hearing officer's findings if they are supported by substantial evidence. *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). Substantial evidence is evidence sufficient "'to persuade a fair-minded, rational person of the truth of a declared premise.'" *Id.* at 209 n.2 (internal quotation marks omitted) (quoting *In re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001)). "'[W]e ordinarily will not disturb the findings of fact made upon conflicting evidence.'" *Longacre*, 155 Wn.2d at 736 (quoting *In re Disciplinary Proceeding Against Miller*, 95 Wn.2d 453, 457, 625 P.2d 701 (1981)). We also give great weight to the hearing officer's evaluation of the credibility and veracity of witnesses. *Longacre*, 155 Wn.2d at 735; *Whitt*, 149 Wn.2d at 717.
>
> The Association must prove misconduct by a clear preponderance of the evidence. *Poole*, 156 Wn.2d at 209. The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt. *Id.* The hearing officer's ultimate conclusion that misconduct occurred should be upheld on review if it is supported by substantial evidence in the record that the lower court could reasonably have found would meet the clear preponderance standard. *See Bay v. Estate of Bay*, 125 Wn. App. 468, 475, 105 P.3d 434 (2005) (citing *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)). Our substantial evidence review should therefore take into account the clear preponderance burden of proof. We review conclusions of law de novo and will uphold them if they are supported by the findings of fact. *E.g.*, *Cohen* II, 150 Wn.2d at 754.

> An attorney challenging findings of fact must present argument as to why the specific findings are unsupported and cite to the record to support that argument. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 191, 117 P.3d 1134 (2005). The attorney must do more than argue his or her version of the facts while ignoring the testimony of other witnesses. *Id.* We will not overturn findings based simply on an alternative explanation or versions of the facts previously rejected by the hearing officer and Board. *Poole*, 156 Wn.2d at 212 (citing *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 133, 94 P.3d 939 (2004)).

Perhaps the most important point on the standard of review is that "[W]hile we do "not lightly depart from the Board's recommendation," we are "not bound by it." *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000) [Emphasis added.]. This pending case contains clear error in the findings, conclusions and recommendation and shows exactly why the court should retain its independent review and change the results when, as in this matter, the record and law do not support the hearing officer's and Disciplinary Board's determinations.

B. Disputed Findings of Fact

Mr. Poole disputes the following findings of fact.

Finding 8 – Finding 8 states that because of the Moore matter, Mr. Poole should have scoured his files for all similar billing mistakes. This is not a finding of fact; it is simply an opinion of the hearing officer as to what she thinks "should have happened." There is nothing in the record to

support a speculation as to what should have happened and this finding should be stricken.

Finding 11 – Finding 11 asserts that the "July Request unambiguously sought 2002 bills that charged clients for work performed more than six months prior to the date of the bill." The hearing officer references Exhibit 11 but she obviously meant Exhibit 4 which is the July 24, 2003, request letter. This letter was not "unambiguous". The letter states "We ask that Mr. Poole provide copies of all 2002 billing statements that include charges for work performed prior to 2001. In addition, we ask that Mr. Poole provide copies of all 2002 billing statements that include charges for work performed in 2001, when that work was performed at least six months prior to the date of the billing statement." Does this include bills which were sent as well as bills that were never sent? What month is the sixth month? If the bill was in sent in January 2002 is the responsive billing month bills with July 2001 work included since that is really five months back but is part of the sixth months or is it excluded. Then what about the February billing – does the cutoff move up to July or August? The hearing officer herself does not understand what the letter asks for – it does not ask for "2002 bills that charged the clients for work performed more than six months prior to the date of the bill" If her

interpretation is correct, then a bill sent in December 2002 would have to be provided if it billed for time in March 2002 since that would be more than six months before the bill yet the letter can also be seen as not requiring such billing since it would have been in 2002 rather than 2001. If the hearing officer herself does not know what the letter asks for, she cannot make a finding based on the language of the letter that it is unambiguous and, therefore, since the only basis for this finding is the letter itself, there is not substantial evidence to support her finding.

Finding 17 – At Finding 17 the hearing officer stated that even though she could not identify or quantify which billings had been sent to clients she nonetheless concluded that some of the billings in Ex. 14 were sent to clients and were responsive to the July 24, 2003 request. She makes no finding as to which ones, just "some of them." This speculative finding flies in the face of the hearing officer's own determinations. As part of its investigation the WSBA reviewed additional computer billing records and attempted to admit them at the hearing to show that these were billings which should have been produced. Ex 14. However, the hearing officer concluded that the records were inconclusive as to whether these billing had been sent to clients. RFFCLR 15 and 16. RFFCLR 17. She specifically found at Finding 17 that "The WSBA did not prove by a clear

preponderance of the evidence that all of the bills in Ex. 14 were sent to clients." She says, however, that Mr. Poole's impeached testimony that he would not have sent some of the bills supports her determination. Testimony as to what he would not have done, impeached or not, does not prove that bills which cannot be identified were in fact sent. She says that large number of bills found in the computer but not in the billing files and the large number of responsive bills that were not produced shows that some of the Ex. 14 bills were sent. Bills in a computer and not in a file and bills that may have been responsive in the Ex. 14 do not show that the bills were in fact sent. The record does not support that portion of Finding 17 that "some" unknown number of bills for persons who cannot be identified were sent. That portion of this finding should be struck.

Findings 20, 21 and 23 – Finding 20 finds that Mr. Poole's testimony regarding whether the bills in Ex 15 were sent was not credible. Even if his testimony is discounted, the Association still had to prove by a clear preponderance of the evidence that the bills were sent. The hearing officer at Finding 21 acknowledges that the JG billing was not sent out. From this it is clear that not all billings in Ex. 15 were sent out. Therefore, the WSBA had to prove which billings were sent to clients – yet it produced no clients to testify they had received bills. The only "positive"

evidence that the bills in Ex. 15 were sent is that they were found in Mr. Poole's billing file which means "it probably was sent." RFFCLRs 18 and 19. A billing in a file which has been proven to contain bills which were not sent, the JG bill, and which "probably means" it was sent does not establish by a clear preponderance of the evidence that the rest of the bills in the file were sent. While some evidence may support this finding it is not substantial evidence sufficient "'to persuade a fair-minded, rational person of the truth of a declared premise." *In re Poole*, 156 Wn.2d 196, 209, n.2, 125 P.3d 954 (2006). The hearing officer's determination that 23 that bills other than JG's were sent based upon here reliance on RFFCLR 20 and 21 is not supported by substantial evidence.

In Finding 23 the hearing officer sought to identify bills that should have been produced in response to the July 2003 request. As demonstrated above, the 17 bills in Ex. 15 were not proven to have been sent. There were four client's billings which may have fallen within the request. GB's January 24, 2002 billing was provided but Mr. Poole did not initially provide three others but did so later. Once he found the January 24, 2002 billing he simply stopped looking for more since he felt he had located the responsive documents. These remaining three files had one common characteristic – they treated specially and as such were not stored in the

billing file cabinet. The JJ bill had been provided by Mr. Poole in another proceeding; prior to this hearing. He clearly was not trying to hide it or else he would not have provided it in that matter. Mr. Poole explained that JJ's file was kept with other billing files because it was in collection. The Kennedy billing was similar – it was in collection. Finally, the SO billing files were not located because these files were subject to special treatment by Mr. Poole because SO was a special, important client. All the evidence was consistent with the fact that these three files were treated differently.

There is no substantial evidence in the record to support the contention that the failure to provide the various billings was anything other than inadvertent oversight. The WSBA must be able to point to specific evidence that establishes by a clear preponderance that these billings were in fact sent to clients and that Mr. Poole's subsequent failure to provide them to the Bar was something more than negligent oversight. Therefore Finding 23 to the effect that the listed billings should have been produced but were not is wrong as it pertains to the billings in Ex. 15 and is wrong as to the others in that it implies that he had found them and then did not produce them at the time. Here the Bar failed to meet its burden .

Finding 25 – Finding 25 is that Mr. Poole sent a letter, Ex. 20, in response to questions from the auditor and failed to state any objections to

providing the entire SO billing files in that one letter. This letter does not state it is a complete response to auditor's letter. It only states that it was "in response" to the auditor's letter. He stated that additional information was going to be sent later. While the letter does not literally contain the word "objection", the implication of the hearing officer's finding is that the letter either had to and/or that this was the time and place to raise any objection. The hearing officer's finding that this letter purported to respond to the *all* of the auditors' questions is not supported by the only evidence - the letter itself. The implication in her finding is that the Mr. Poole had to raise any objections in that letter is also not supported by law (there is no requirement that objections to have been raised in the letter).

Findings 26 and 27 – Findings 26 and 27 are that the request for the entire billing file was relevant to the audit of the single issue of the $540 error in the SO file is simply not supported by any evidence. Nothing in the record supports why the *entire* file was relevant to one small error on one month's billings. The evidence does not support that in the audit process there was any reason or need to demand the entire file.

Finding 30 –The hearing officer found that Mr. Poole's deposition was the first time he articulated his objections to producing the SO file, that the only basis for his objection was that "it was large and pertained to

many years," that the grounds he gave in seeking a protective motion filed the next day were "the file consisting of several volumes and many years" and that none of these were valid objections. These are unsupported findings. Mr. Poole, through his counsel, had specifically objected twice before his deposition to the scope and intrusive nature of the request. At his deposition Mr. Poole stated twice that he was not producing the entire file because the request was "intrusive." Ex 31, pages 39 and 40. He also stated that the request was overly burdensome. Mr. Poole asserted in his motion that the Association sought "overbroad and unreasonable access to Mr. Poole's files" and that he sought to limit on the scope of the request since it was an invasion of privacy, denial of due process and an unreasonable search and seizure. Ex. 105, pg. 000007. The evidence does not support any portion of Finding 30 and should be stricken.

Findings 54 and 55 – The findings here was that there was "no evidence that, but for Respondent's condition, the misconduct alleged would not have occurred, nor is there evidence that he has recovered." She found that Mr. Poole demonstrated an understanding of what was being asked for him. These appear to go to the hearing officer's incorrect and overly narrow interpretation that the mitigator of personal or emotional problems did not apply. She appeared to be seeking to make

determinations more consistent with the mitigator of mental disability. ABA Standard 9.32(i) (1992), something Mr. Poole never sought or asked for. The Disciplinary Board rejected her conclusions: "The Hearing Officer construed the mitigator too narrowly." Decision, Appendix 1. These issues were not relevant to the issue before her, are unnecessary findings and are not supported by the record as they were not at issue.

B. Circumstantial Evidence

At Para.70, she correctly cited the law regarding the use of circumstantial evidence: the WSBA need not disprove every possible theory provided by a respondent *but it does need to produce facts from which only one reasonable conclusion may be inferred. In re Guarnero,* 152 Wn.2d 51, 61, 93 P.3d 166 (2004). The key to this language is that while the WSBA does not have to disprove whatever untenable or frivolous alternative theory a respondent may argue. Instead it must exclude or disprove all reasonable alternatives until there is only one reasonable conclusion that can be reached. This is one of the reasons why the alternative findings (discussed below) cannot be sustained – the WSBA did not establish that only one reasonable finding could be made on the evidence, which means that it did not establish its facts by a clear preponderance of the evidence and, therefore. it did not meet its burden.

The issue of what is a reasonable alternative theory would appear to be a legal conclusion considered de novo by this court. In order for the WSBA to prevail in this matter, it must have shown that Mr. Poole's alternative theories were not at all reasonable. Mr. Poole's evidence established that his failure to produce the additional billings were a result of mistake or negligence and that not providing the SO billing file until later was because of his belief that the Association's request for the complete file was intrusive and overly broad as part of a trust account of an audit review. The WSBA did not disprove all reasonable alternatives and there was not only one reasonable conclusion that could have been be reached. Because the Bar relied solely upon circumstantial evidence in arguing that the only reasonable finding was that it was not negligence. The determination does not rest on whether Mr. Poole is found to be credible or not and certainly does not where even the hearing officer was unable to determine what had occurred. The Association did not disprove Mr. Poole's reasonable defenses of mistake or his assertion that the request for SO's billings was overly intrusive. Pursuant to *Guarnero*, the WSBA did not prove its circumstantial case. Its grievance must be dismissed.

D. Alternative Findings of Fact

Reliance on alternative findings of fact leads to inconsistent results. The hearing officer must make findings based on substantial evidence. This evidence can only support one factual conclusion for any single set of events. When the hearing officer makes two or more conflicting findings regarding the same event, neither finding has been proven. Alternative findings of fact then result in faulty conclusions of law because there can be no proper link between the findings (which cannot have proven) and the conclusion of law which rely upon them.

Finding 56 - Finding of Fact 56 makes alternative findings to the effect that Mr. Poole either "misrepresented the extent of his efforts to find responsive bills or he willfully failed in his duty to cooperate and look for them." This court has stated that its "substantial evidence review should ... take into account the clear preponderance burden of proof." "The clear preponderance standard requires more proof than simple preponderance, but less than beyond a reasonable doubt." *In re Disciplinary Proceeding Against Marshal*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). The fact that the hearing officer was unable to make a definitive determination of what happened shows that the Bar Association was unable to prove what had occurred by a clear preponderance of the evidence.

The Bar had to prove what happened one way or the other. According to the Bar and the hearing officer Mr. Poole either made a misrepresentation to the Bar about what he had done *or* he failed in a duty to cooperate. One is a very different than the other – one goes to personal integrity and the other does not. Which did he do – did he lie or did he fail to cooperate? When the hearing officer said "It must have been one or the other but I don't know which" it shows that the hearing officer did not know, the Board could not know and on the basis of this record this court cannot know. The same set of events cannot prove two things and, therefore, there is a failure of the very high required burden of proof.

Finding 59 – In RFFCLR 59 the hearing officer found and the Board approved this alternative finding:

> Respondent's principal defense to the non-production of the SO file was that he had a legitimate basis for objecting to the production of a file dating back many years. But if he did, he failed to timely and properly assert it. Moreover, either the objection was made without looking at the file or it was untrue, or Respondent's declaration stating that he could not find two volumes was untrue.

Mr. Poole did timely and properly assert his objections The last sentence of Finding 59 must be stricken since the hearing officer was unable to determine which of three possible factual scenarios was correct. Did Mr. Poole make an objection without looking at the file or did he look

at the files, learn something, and then make untrue objections or did he tell untruths when he said he could not find two volumes?

There is nothing in the record to support any findings regarding Mr. Poole being unable to find two volumes. He was not challenged on this, the WSBA did not raise it as an issue and there was no proof regarding it. This is why the Board struck the portion of Paragraph 90 which used such finding as the basis for a finding of dishonest or selfish motive. The Board stated in its decision at footnote 1 "... Mr. Poole was not charged with falsely describing the SO billing file or falsely stating that volumes 1 and 2 of the file could not be found. This issue does not appear in the formal complaint and *was not the subject of testimony at the hearing*." [Emphasis added.] The Board found that the record does not support the portion of Finding 59 regarding "untruths" regarding volumes and all such references must be stricken as not supported by the record.

The findings regarding whether "the objection was made without looking at the file or it was untrue" is also not supported by the record – there is no testimony supporting these findings. As discussed above, if the hearing officer could not determine which it was, then it was not proven by a clear preponderance since these require opposing facts – he either did not look at the file or he looked but then was untruthful. They cannot both

be true and thus the Association did prove either of these by a clear preponderance since if either one had met the burden of proof, the other finding could not and would not have been made.

Finding 31 – This alternative findings states that either Mr. Poole's objections in his deposition and motion to the Disciplinary Board were unfounded because they were not based on his knowledge or a belief formed after a reasonable inquiry or instead he withheld Volumes 1 and 2. She found that it was "inconceivable" that he had not found Volumes 1 and 2 but Mr. Poole nonetheless gave a declaration to the ODC that he had not been able to find them. This is all conjecture which is not supported by the record. As discussed above the Board found that this issue was not an issue in the hearing and "was not the subject of testimony at the hearing."

Finding 9 – "Respondent either found all bills with old time, or he failed or refused to look for them". As with 56 and 59, all of these cannot be true – did he find the time, did he fail to look for them or did he refuse to look for them? Since the hearing officer could not figure out which, if any, were true, substantial evidence does not support these findings.

Striking Paragraphs 9, 31, 56 and 59 – Instead of entering findings supported by substantial evidence, in Finding 56s and 59 she did not but instead simply stated alternate versions of possible facts. Is there

"substantial evidence" when even the hearing officer is not able to determine what the evidence shows? If the hearing officer cannot reach a conclusion as to what happened but must instead rely upon possible alternatives then the record does not contain substantial evidence to support her conclusions. Finding of Fact 56 and 59 must be stricken. This has an impact on a number of other findings, conclusions and on the one of the aggravators (Dishonest or selfish motive) found by the hearing officer. The discussion regarding the aggravator is discussed below.

E. Due Process and Constitutional Issues

Knowing that the Matson case was pending before this court, the WSBA nonetheless took the extreme action of filing a petition for interim suspension at the same time. Mr. Poole had sought to resolve the SO billing file issue before the Disciplinary Board, however the Association was unwilling to. Instead it pushed the case forward in a setting which posed the maximum potential of harm to Mr. Poole while refusing to allow resolution at a lower level. It achieved its goal of putting Mr. Poole into a situation in which he had too much to risk in continuing to assert his belief and objection that the request for the entire file was overbroad.

Mr. Poole raised legitimate concerns about the scope of the WSBA's inquiry powers. Lawyers are not subject to random searches and

investigations just because the WSBA is curious. The WSBA is an arm of the State Supreme Court and as such its actions are state action. The WSBA, just as with any arm of the state, must respect basic due process rights of the lawyer. A respondent is certainly entitled to reasonable due process rights. United States Supreme Court case law has found that bar disciplinary proceedings are "quasi-criminal." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). Washington case law has established that bar proceedings are *sui generis* and are not criminal but that there are due process requirements in a bar disciplinary case. *In re Allper*, 94 Wn.2d 456, 617 P.2d 982 (1980). While not all criminal due process rights attach, heightened due process rights do attach in disciplinary proceedings because of the constitutionally protected right which is at stake.

In a medical disciplinary case the Washington court held in *Nguyen v. Department of Health*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001) that:

> At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. "Procedural dues process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" [Citation omitted.] A medical license is a constitutionally protected interest which must be afforded due process. [Citations omitted.]

The court, at pages 528-29, found that a medical disciplinary proceeding was "[Q]uasi-criminal" in exactly the same sense the United States Supreme Court used the term when it characterized disbarment proceedings "quasi-criminal." In re Ruffalo, 390 U.S. 544, 551, 88b S. Ct. 1222, 529, 20 L. Ed. 2d 117 (1968). If disbarment is quasi-criminal, so must be medical de-licensure."

One of the most basic rights granted to citizens in both criminal and civil matters is the right to privacy. Here the WSBA sought to invade Mr. Poole's right to privacy by requiring him to produce records in the hopes they could find some sort of ethics violation.

> The United States Supreme Court has recognized the "right of privacy" may be created by specific constitutional guaranties although the "right of privacy" does not exist in any specific provision of the United States Constitution. Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in [that person's] private affairs, or [that person's] home invaded, without authority of law." This provision focuses on the protection of a citizen's private affairs. Personal rights found in the guaranty of privacy are fundamental to or implicit in the concept of ordered liberty. If the right of privacy offers any protection, that protection must include the right to be left alone. [Citations omitted.]

State v. Lee, 135 Wn.2d 369, 391, 957 P.2d 741 (1998).

By demanding that Mr. Poole produce the entire SO billing files where there was no lawful basis for doing so, the WSBA was invading his

privacy. This is simply the classic case of the state becoming curious about one of its citizens and then seeking to improperly review that person's private records. Mr. Poole had the right to be left alone in the conduct of his law practice without unfounded intrusion by the WSBA. The evidence showed he gave them the records they needed for audit purposes.

The WSBA's demands for the entire SO billing file were based on "loose, vague, or doubtful bases of fact" and there are no facts "sufficient for a reasonable person to conclude [that Mr. Poole] probably [was] involved in [misconduct]."

Mr. Poole did not "refuse to cooperate" in regard to the SO billing files. He provided the necessary documents and information to respond to the information required as part of his probation audit yet at the same time refused to let the Association conduct a fishing expedition into his files. He did not ignore the Bar, he let them know in a timely way his position and sought resolution. When the Bar refused his attempts to resolve the issue but instead said it wanted to do so through a grievance process, he again sought resolution and again was rebuffed. When the Bar pushed the matter to the point where he had to risk loss of his license he "capitulated" to their demand and provided the information. He is now being punished for having raised his good faith challenge to the scope of the Association's

authority to simply demand files. Counts 3, 4 and 5 should all be dismissed since Mr. Poole did not improperly refuse to cooperate or to provide information.

F. The Impact of the Numerous Failures of Proof, the Improper Use of Circumstantial Evidence, the Use of "Alternative" Findings of Fact and the Use of Unproven Issues Regarding SO Volumes 2 and 3.

In total all or portions of Findings 8, 9, 11, 17, 20, 21, 23, 25, 26, 27, 30, 31, 54, 55, 56, 59 and 70 must either be struck in part or in entirety because the record does not contain substantial evidence based on the clear preponderance of the evidence sufficient to support them or they are based on improper alternative findings or they are based on circumstantial evidence which does not result in the finding being the only reasonable conclusion which can be drawn from it. The Bar also failed to prove that Mr. Poole acted knowingly rather than negligently since its case in this regard relies upon circumstantial evidence but they did not disprove a the reasonable alternative conclusion of negligence which can be reached from the same facts. Without these findings the determination that Mr. Poole knowingly failed to provide complete responses to the July request and ODC's request for SO billings in Counts 1, 2, 3, 4 and 5 cannot be sustained since they rely upon determinations of what Mr. Poole "should have done"; that the request letter to him was unambiguous; the some

unknown, unquantified and unidentified billings in Ex. 14 were sent; that billings in Ex. 15 were sent even though at least one was certainly not sent; that other billings should have been sent and that the failure to do so was not negligence; that he failed raise valid objections in a timely way; that the request for the entire SO billing file was reasonable when the only issue was a $540 billing error which Mr. Poole satisfactorily explained immediately upon inquiry; that alternative determinations of fact stemming from the same event are proof of what happened; and that Mr. Poole acted improperly in regard to volumes 2 and 3 of the SO billing file. The record fails to establish the violations alleged and the grievance should be dismissed.

If the grievance is not dismissed, the court should at least determine that Mr. Poole acted negligently rather then knowingly because based on the WSBA's circumstantial evidence and Mr. Poole's direct evidence a reasonable person can conclude that Mr. Poole's failure to provide the requested documents was his negligence in finding them exacerbated by the personal and emotional problems which "substantially contributed" to his actions and that his belief that he had a legitimate basis to object to the very broad SO billing file request in the context of an audit was in made good faith.

VI. DETERMINATION OF THE SANCTION

If the court decides not to dismiss this matter, it will then engage in a determination of an appropriate sanction in regards to Mr. Poole's conduct based on which portions of the Bar's case the court determines were proven. The court does this by use of the *ABA Standards for Imposing Lawyer Sanctions.*

The *ABA Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) (*Standards*) governs lawyer sanctions in Washington. *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004) Crucially, however, the Standards are "a basic, but not conclusive, guide." *In re Disciplinary Proceeding Against Whitney*, 155 Wn.2d 451, 468, 120 P.3d 550 (2005). [Emphasis added.] The court's purpose in adopting the ABA *Standards* was to promote consistency in disciplinary sanctions. *In re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 424, 963 P.2d 818 (1998). The court has frequently articulated its process of considering the Standards and the process it follows in determining a sanction:

> To arrive at the proper sanction, we first evaluate whether the Board properly determined the presumptive sanction by considering (1) the ethical duties violated, (2) the lawyer's mental state, and (3) the actual or potential injury caused by the lawyer's misconduct. *Id.* at 412-13; *see also* Standards std. 3.0(a)-(c). We then consider the relevant aggravating and mitigating

> circumstances. Standards std. 3.0(d). Finally, we consider the Board's degree of unanimity and the proportionality of the sanction and whether departure from the recommended sanction is justified. *Egger*, 152 Wn.2d at 413. Generally we give greater weight to the Board's recommendation than we do to the hearing officer's, especially where the recommendation is unanimous. *Id.*; *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 59, 93 P.3d 166 (2004). Although we are not bound by the Board's recommendation, we generally uphold it unless we "'can articulate a specific reason to reject [it].'" *Id.* (quoting *In re Disciplinary Proceeding Against McLeod*, 104 Wn.2d 859, 865, 711 P.2d 310 (1985)).

In re Disciplinary Proceeding Against Perez-Pena, 161 Wn.2d 820, xxx, 168 P.3d 408 (2007).

When the court considers that not all the findings against Mr. Poole were proven, Mr. Poole's mental state, the level of injury and the impact of the significant mitigator of "personal or emotional problems" and further takes into account the extreme severity of the recommended sanction against Mr. Poole when considered in proportion to other cases, it should reject the recommended sanction.

A. Ethical Duties Violated

The hearing officer found that the ethical duties violated were violations of duties owed to the legal system, Standard 6.0, and duties owed to the profession, Standard 7.0. If a sanction is to be imposed, Mr. Poole agrees that Standard 7.0 would be the applicable standard but does

not agree that Standard 6.0 applies because the injury requirement of that Standard, as discussed below, is not applicable.

B. State of Mind

The hearing officer found that for Counts 1, 2, 3, 4 and 5 Mr. Poole acted knowingly. RFFCLR 57 – 61, and 71 – 77. For the reasons outlined in the sections above, Mr. Poole asserts that his failure to respond and to provide information was negligent rather than knowing.

C. Injury

The hearing officer found that in regards to the counts at issue here, Mr. Poole caused actual and potential harm to the disciplinary system as a whole, actual and potential harm to the ODC in the form of increased efforts and costs, and potential harm to ODC's preparation for particular proceedings such as the Moore Grievance. RFFCLR 65.

So is the harm the fact that a lawyer rises to defend himself by asserting his due process rights which he has the absolute right to do? This cannot and must not be the conclusion. Every litigant has to the right to reasonably question and defend. This is a fundamental part of our legal process. There can be no harm to any person or entity in the legal system because a defendant stands up and asserts his or her undeniable rights.

Mr. Poole contests that he caused potential harm to the ODC's preparation of the Moore case because that hearing officer determined that multiple, inadvertent errors in billings to five clients was not a violation of the RPCs. App. C. The Moore hearing officer determined that all the billing errors stemmed from a single decision (the decision to bill old time on the 2002 bills). RFFCLR 6. All of the additional billing errors presented in this matter are rooted in the Moore case. There is no reason to believe that the Moore hearing officer would have made a different decision simply because more of the same mistakes were shown.

D. The Presumptive Sanction

The hearing office found that the presumptive sanction was suspension under Standard 6.12 and 7.2. RFFCLR 85.

Standards 6.12 to 6.14 cannot apply even if Mr. Poole acted knowingly since that Standard requires injury to a party or adverse or potentially adverse effect on the legal proceeding. The only possible determination made by the hearing officer regarding such an injury element relates to the Moore hearing. As discussed above there was no injury or potential injury to either the WSBA or the legal proceeding since merely adding more evidence of the same mistake would not have changed the result in Moore (App. C). As such there was no harm to the legal

proceeding or to a party even assuming the WSBA is a party within the meaning of Standards 6.12 – 6.14.

Mr. Poole agrees that if a sanction is to be imposed, the appropriate title is Standard 7 – Duties Owed to the Profession. However, Standard 7.2 is not the appropriate presumptive sanction since Mr. Poole acted negligently. The appropriate presumptive sanction is Standard 7.3, reprimand for negligent conduct in violation of duties owed to the profession and which cases injury to the legal system.

If, however, the court should determine that the presumptive sanction is suspension under Standard 6.12 and/or Standard 7.2, then the presumptive period of suspension is six months. Standard 2.3. The starting point for any suspension is the presumptive sanction provided in the Standards, not the recommended sanction of the Board.

If the presumptive sanction is suspension, the question then is whether after balancing the aggravators and mitigators as well as the proportional analysis a reduction to a non-suspension or one less than six-months is merited. If the presumptive sanction is reprimand the question is whether the aggravators and mitigators as well as the proportional analysis lead to a reduction to less than a reprimand.

E. Aggravators

The hearing officer found six aggravating factors at Paragraph 90 of the RFFCLR. Mr. Poole challenges the determinations of "Dishonestly or selfish motive" and "Pattern of Misconduct."

(1) Dishonesty or Selfish Motive: One of the factors found by the hearing officer was "Dishonest or selfish motive." The Board struck significant portions the hearing officer's determination and modified this portion of RFFCLR 90 to read:

> As set fort in paragraph 56, Respondent described in a letter and in a deposition efforts he had under taken to find responsive billings, which efforts likely would have resulted in his finding them. Respondent either misrepresented the extent of his efforts to find responsive bills, or he willfully failed in his duty to cooperate and to look for them.

The record and the law do not support a determination of dishonest or selfish motive. Mr. Poole disputes that he misrepresented the extent of his efforts to find responsive bills or that he failed in his duty to cooperate and to look for them. Even if the court accepts that he did one or the other. Count 1 alleged dishonesty under RPC 8.4(c) as a necessary factual element of the alleged RPC 8.4(c) violation and Counts 2, 4 and 5 all alleged failure to cooperate under ELC 5.3(e) for these same events. What Mr. Poole did in connection with the request for July billing records and the SO billing file were "part of the factual basis" of Counts 1, 2, 4 and 5.

This same conduct cannot be "a separate aggravating factor." *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707; 720, 2 P.3d 173 (2003). *Whitt* holds that there is no "doubling dipping." It is not proper to use the same conduct which was required as a necessary element to prove the violation and then turn around and use that same conduct to "aggravate" the violation.

The dishonest and selfish motive determination is based on the alternative findings of fact at RFFCLR 56. As discussed, the determination that Mr. Poole either: (1) made a misrepresentation of his efforts to find responsive billing; or (2) willfully failed in his duty to cooperate and look for them are substantially different matters. The Bar was unable to prove which it was. The use of this alternative finding at paragraph 90 by both the hearing officer and the Board shows exactly why alternative findings of fact are not appropriate. If Mr. Poole made a misrepresentation to the Bar about what he did such a finding *might* support a finding of dishonesty but a finding of a failure to cooperate does not go to issues of Mr. Poole's personal integrity and does not support this aggravator.

Even if true, the alleged conduct does not show a dishonest or selfish *motive*. The hearing officer and Board found Mr. Poole engaged in a dishonest or selfish *act*. A person can engage in a dishonest or selfish act

but may not necessarily have a dishonest or selfish motive for doing so. For example, suppose a lawyer represents someone seeking asylum in the United States. The lawyer feels sorry for the person and genuinely feels that if the person is returned to his/her country he/she will be killed. If the lawyer knowingly helps the person submit a false affidavit to support the asylum application, the lawyer will have engaged in a dishonest act as well as a selfish act since it may make him/her feel better about not letting a person die but the lawyer did not have a dishonest or selfish *motive* for doing so, when in fact the motive was just the opposite. The lawyer was trying to help someone in a positive way. The hearing officer and the Board apparently saw an *implication* that Mr. Poole's alleged actions were motivated by dishonesty or by selfish interests but the only finding to support this determination is Finding 56. All conclusions must be "supported by substantial evidence in the record." *In re Disciplinary Proceeding Against Marshal*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). Finding of Fact 56 seeks to make a determination as to the act but there is no finding or support in the record for the *motive*.

(2) Pattern of Misconduct: There is no pattern of misconduct in this matter. There are only two events alleged. The alleged failure to provide the bills in response to the July 23, 2003, request and the initial

objection to providing the complete SO file. Both of these essentially boil down to not cooperating with a Bar investigation. There is no case indicating that "two" constitutes a "pattern." He did not "[Commit] multiple RPC violations with respect to three separate clients over an extended period of time." *Discipline of Anschell*, 141 Wn.2d 593; 615, 9 P.3d 193 (2000). He did not commit "multiple violations involving multiple clients over an extended period." *In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 586, 70 P.3d 940 (2003). Nor was his conduct on the scope or scale found in *In re Discipline of Halverson*, 140 Wn.2d 475, 998 P.2d 833 (2000) (sexual relations with six clients constitutes a pattern of misconduct). At the most Mr. Poole's conduct was similar to *In re Discipline of McMullen*, 127 Wn.2d 150,171, 162, 896 P.2d 1281 (1995) (multiple violations as to one client is not a pattern of misconduct). The court must reject the determination that there was a pattern of misconduct.

F. Mitigator

The hearing officer declined to find any mitigators. The Board rejected this and found that Mr. Poole's personal or emotional problems had substantially contributed to the alleged misconduct. Appendix A. The Board modified RFFCLR 91 to read as follows:

Para. 91. The evidence in the record establishes the mitigating factor of personal and emotional problems (ABA Standard 9.32(c) [fn omitted]. Both experts testified that Mr. Poole suffered from bipolar disorder II and anxiety disorder, not otherwise specified, during the relevant time period. TR 863, 942, 943. Dr. Reichler testified that Mr. Poole's failure to provide all responsive documents to the WSBA's July 2003 request was "certainly" related to his emotional and personal problems at that time. TR 871. Dr. Reichler also testified as follows:

Q. Can we say that the bipolar disorder is causing the problem?

A. Well, you focused only on bipolar disorder. I think it's a combination of that and, you know, both his being depressed and sometimes not paying attention to some of the details as well as an enormous amount of anxiety. So. I don't know, because I don't know the specific events and the specific conditions under which they occurred, but certainly those kinds of thins will occur with the underlying problems, yes. TR 900.

Dr. Andrea Jacobson [the WSBA's IME Expert] testified as follows:

A. I can conclude on a more probable than not basis that the bipolar disorder of Bipolar Disorder II as described by Dr. Reichler in '03 with variable moodiness, some problems with impulse control early on, but continuing mood difficulties and anxiety disorder, that that would contribute to this, to what degree I don't know. TR 956.

A. These mental disorders have substantially contributed to the misconduct alleged. TR 982 (reading from report).

The record establishes personal or emotional problems that substantially contributed to the alleged misconduct. It was not necessary that Mr. Poole's personal or emotional problems caused his misconduct for this to be a mitigator. The Hearing Officer construed the mitigator too narrowly. [fn omitted].

Strangely, having found this mitigator and that is "substantially contributed" to Mr. Poole's misconduct it then failed to apply the mitigator to the sanction nor did it provide any rationale for failing to do so. All the Board did was add a requirement of continued medical treatment during probation period. In this court's de novo review of the sanction the Boards' finding that Mr. Poole's personal and emotional problems "substantially contributed to the alleged misconduct" now demands that Mr. Poole's recommended sanction be substantially reduced.

G. Balancing of the Aggravators and the Mitigator

The remaining aggregators of prior disciplinary offences, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct and substantial experience in the practice of law are more than offset by the significant mitigator a of personal or emotional problem which "substantially contributed to the alleged misconduct." On balance, this offset merits a reduction from the presumptive sanction of a six-month suspension and/or a reprimand depending upon which Standard is being applied. Once proportionality is considered, it is clear that the appropriate sanction is a suspension of 45 days or less or reprimand.

VII. PROPORTIONALITY

The doctrine of proportionality, as recognized and applied by this court, requires that any sanction imposed be consistent with other similar cases. The cases cited below[3] address the same issues as in Mr. Poole's case. That issue is what is the proportional sanction in a case where the lawyer has been found to have not cooperated and failed to provide information? What the prior cases establish is that the presumptive sanction of a six-month suspension and the recommended sanction of a one-year suspension in this case are extreme and excessive. An analysis of these cited cases applying the doctrine of proportionality demonstrates that only extreme conduct results in a sanction for a one-year suspension or more for non-cooperation. Mr. Poole's actions do not approach the levels of misconduct in the cases cited below. These cases demonstrate that the scope of the sanctions imposed for a lawyer's failure to cooperate generally range from an admonition to a six month suspension. They also delineate the specific conduct of the lawyer's failure to cooperate which merited a greater level of sanction.

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[3] The cited cases are either reported cases or, consistent with the requirement that respondent provide information with a "degree of specificity necessary to permit a meaningful comparison," the record contains the applicable orders and/or hearing officer decisions and Disciplinary Board decisions. *In re Disciplinary Proceedings Against Cohen*, 150 Wn. 2d 744, 763, 82 P.3d 224 (2004).

The disproportional nature of the recommendation that Mr. Poole receive a one-year suspension can be seen in cases such as the Brenda Means case, Bar Number 26180. CP Briefs, BF 63, page 183.[4] In this case the lawyer did not respond to any inquiries from the WSBA, failed to attend a scheduled deposition, appeared two hours late at a rescheduled deposition and failed to refund unearned fees. She received an admonition. Mr. Poole did not do these things and yet the Bar seeks a long suspension.

In the Alberto Germano case, Bar Number 08739, CP Briefs, BF 63, page 186, the lawyer received a 60 day suspension. The lawyer failed to respond to the Bar's investigation, failed to appear for his subpoenaed disposition, and then failed to respond to later inquiries. The hearing officer found he knowingly failed to cooperate in conjunction with multiple other ethical violations. Mr. Poole did respond to the Bar's investigations; he appeared for his depositions and, he responded to later inquiries. In comparison to Germano, a 60 day suspension for Mr. Poole is disproportional and excessive.

There are a number of other cases which establish that the recommended one-year suspension sanction is disproportional here.

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[4] The references here and for other unreported cases are from the record forwarded to the court by the Clerk to the Disciplinary Board and consist of the

Karen Unger – Proceeding No. 03#00007 – CP Briefs, BF 60, page 27. Ms. Unger was charged with a number of violations which were dismissed after a hearing. She was also charged with non-cooperation. During the course of the investigation she objected, through her counsel, to providing tax reporting documents requested by the Association and later "begrudgingly" provided those tax documents. She received only an admonition.

Unger demonstrates that a non-cooperation case based on the lawyer objecting to the production but then begrudgingly providing the documents merits nor more than an admonition. Mr. Poole objected in good faith to the Association's request and then later provided the documents. However, unlike in *Unger* who provide nothing until later, Mr. Poole also provided documents prior to a grievance being filed.

James D. Pack – Public No. 04#00034 – CP Briefs, BF 60, page 55. Mr. Pack was charged with one count of failing to file a timely appeal and was found to have acted negligently on that count. He was also charged with three counts of trust account violations and was found to have acted knowingly on these counts. He was also charged with two counts of failure to cooperate. He was found to have acted "at least"

Clerks' Paper (CP), Bar File Number (BF) and page number assigned by the

knowingly on these counts. He engaged in the bad faith obstruction of the disciplinary proceeding by failing to answer the complaint or participate in the disciplinary hearing. He received an 18-month suspension. Mr. Poole did not commit any of this misconduct. Mr. Poole did not engage in bad faith obstruction and made a good faith effort to provide the documents or to explain why he was not doing so. He answered the complaint, participated in discovery and attended the hearing. The sanction in Pack was an 18-month suspension and yet Mr. Poole's recommendation for behavior not close to this is for one year. This is disproportional.

Mark Lehinger – Public No. 04#00045 – CP Briefs, BF 60, page 65. Mr. Lehinger was charged with three counts of misconduct – practicing law while suspended, failing to keep his clients informed and making false statements to the Association in connection with a grievance investigation. At hearing he was found to have intentionally made a false statement to the WSBA regarding when he had filed documents in connection with his suspension. He also stipulated to providing medical records but when he did so he only provided them from one doctor and not from two others. Mr. Lehinger was found to have violated all three counts

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Clerk.

and the hearing officer recommended a six-month suspension. The Disciplinary Board increased the suspension to one year.

Mr. Poole did not commit any of the misconduct Mr. Lehinger did. Mr. Poole did not make any false statements, yet Mr. Poole's sanction recommendation is nonetheless also for one year. This is disproportional.

In Antonio Salazar – Public No. 02#00022., CP Briefs, BF 60, page 79. Mr. Salazar was charged with 6 counts of misconduct. After a hearing he was found to have engaged in four counts of failure to communicate, failure to act with diligence and failure to account for fees. He acted negligently in regards to these counts. He was also found to have acted knowingly in failing to respond to bar association request on *five* separate grievances. In a prior disciplinary actions he failed to abide by the disciplinary rule process. The hearing office recommended a 30-day suspension for all counts. The Disciplinary Board made several changes to the findings but affirmed the 30-day suspension while noting that Mr. Salazar's prior "problematic behavior towards his clients and the Association has not improved." The Board found that Mr. Salazar did not cooperate promptly with requests and deadlines in the disciplinary investigation but he did ultimately provide the information.

Mr. Salazar committed more violations than Mr. Poole, yet received only a 30 day suspension. Mr. Poole's one year suspension recommendation is grossly out of proportion to Mr. Salazar's 30 day suspension for significantly more serious misconduct than Mr. Poole is alleged to have committed.

The case of *In Anthony P. DeRuiz*, 158 Wn.2d 558, 99 P.3d 881 (2004) involved two separate disciplinary cases which had been combined. Mr. DeRuiz was found to have neglected client cases, failed to communicate with clients, failed to refund unreasonable and unearned fees and failed to cooperate with grievance investigations. Mr. DeRuiz failed to respond to an inquiry letter or provide a copy of his file upon request. His deposition was then noted. After a continuance based on a letter he sent one day before the schedule deposition, he did appear for his deposition He then terminated a deposition early on the basis that he wanted to consult with counsel. He was supposed to be back in contact by a date certain but did not do so. When the WSBA noted that it had rescheduled his deposition, he advised that he had given the information requested and did not show up for the deposition. He then ignored a follow up offer by the WSBA to reschedule the deposition. He followed a similar pattern in regard to another case and essentially refused to provide any information

whatsoever until after he was suspended on an interim basis for failure to cooperate. He then appeared at a deposition, provided the information and the suspension was lifted.

Mr. DeRuiz asserted that part of his reason for not cooperating were prosecutorial overreaching and a failure to balance his due process rights. The court found that there was no basis for the prosecutorial overreaching argument and that he provided no reasonable argument that his due process rights were implicated. However, the clear implication from the case is that if a reasonable basis raising due process was asserted it would provide a defense in a non-cooperation case. Several aggravators were found against Mr. DeRuiz, including bad faith obstruction and submission of false evidence, false statements or deceptive practices during the disciplinary process. He received a six-month suspension for each of the two cases including the other misconduct as well as the non-cooperation misconduct. The Supreme Court ordered the six-month suspensions to run consecutively.

The significance of *DeRuiz* to the analysis here is that his misconduct included significant non-cooperation far worse the Mr. Poole's yet Mr. DeRuiz received a six-month suspension. There is no finding that Mr. Poole was guilty of bad faith obstruction or submitting false or

deceptive evidence. Unlike *DeRuiz*, Mr. Poole did not ignore the Bar's request but responded and asserted a good faith objection to providing the entire SO billing information. At the same time he provided the documents necessary to directly address the auditor's questions. Once again, the recommended sanction of one-year is disproportional to the six-months recommended in *DeRuiz*.

These cases establish that the recommended sanction for Mr. Poole was excessive and that the presumptive six-month sanction is also excessive. Cases involving a lawyer's failure to cooperate carry sanctions that range from an admonition such as in *Unger*, to a 30 day suspension such as in *Salazar* and a six month suspension such as in *DeRuiz*. It is only in extreme situations such as completely ignoring the entire process or in combination with other misconduct that a sanction of a suspension of six months or more is imposed. In the majority of these extreme cases no significant mitigators were present. In Mr. Poole's case, the Board found that the mitigator of personal and emotional problems "substantially contributed to the alleged misconduct." This mitigator was not present in any of these other cases.

The court should also consider that Mr. Poole's conduct did not rise to the level of a disregard of his duty to cooperate. The Bar has argued

that Mr. Poole's failure to completely respond to their requests equates to a complete disregard of his duty to cooperate. This concept fails to take into account that the lawyer, like every litigant, has a due process right to object to what he reasonable believes to be an overly broad discovery request. Mr. Poole's challenge to the Bar's request was not demonstrated to be either fraudulent or frivolous. Instead, his objection was a reasonable challenge to the WSBA's overly broad request. So to assert the presumptive sanction of suspension against Mr. Poole for his legitimate exercise of due process is in and of itself a disproportionate sanction. It is unfair to penalize a lawyer for legitimately defending himself.

VIII. CONCLUSION

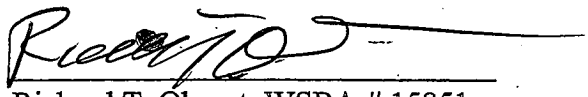
Mr. Poole asks this court to dismiss the grievance on the basis that the record does not contain substantial evidence to support the challenged findings which serve as the basis for the alleged lawyer misconduct. If the court does not dismiss the grievance than the issue if what sanction is to be ordered? Mr. Poole's mental state was negligent, for which the presumptive sanction is a reprimand. If his level of culpability was knowing, then given the significant mitigator of personal and emotional problems which "substantially contributed" to the alleged misconduct, then his mental state comes close to returning to negligent. The level of

injury of harm under these facts was not that great. On balance, the significant mitigator of personal and emotional problems which "substantially contributed" to the alleged misconduct outweighs the aggravators.

If the court determines that the presumptive sanction is suspension (which is no more than 6 months), the doctrine of proportionality requires an downward adjustment from 6 months. The proportionality analysis reveals that under these facts, either an admonition or a reprimand is a proportional sanction. The longest suspension would be no more than 30 days. However, the mitigator of personal and emotional problems then has to be applied, which results in either a admonishment or reprimand.

Lawyers who provide false testimony and evidence in bar proceedings, ignore the Bar's subpoenas, fail to attend depositions, fail to answer the complaints, intentionally interfere and obstruct proceedings and fail to attend disciplinary hearings should and have been sanctioned. Under the facts of this case Mr. Poole should not be.

Dated this 15th day of February, 2008.

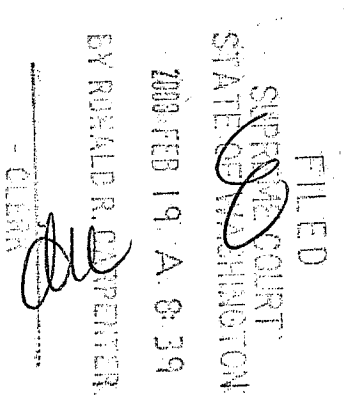


Richard T. Okrent, WSBA # 15851
Attorney for Respondent Poole

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington, that on February 15, 2008, I caused to be deposited in a First Class Mail United States Postal Service Facility, First Class Mail, postage prepaid, the original of THE RESPONDENT'S OPENING BRIEF to:

The Clerk of the Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929



and a copy to

Mr. Craig Bray
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Signed this 15th day of February, 2008 at Everett, Washington.

Jeffrey G. Poole

APPENDIX A

TO REPONDENT'S OPENING BRIEF

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **JEFFREY POOLE,** Lawyer (Bar No. 15578).	Proceeding No. 05#00076 DISCIPLINARY BOARD ORDER MODIFYING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its July 20, 2007 meeting on automatic review of Hearing Office Kimberly Boyce's decision recommending a one-year suspension and two years probation, following a hearing.

Having reviewed the documents designated by parties and heard oral argument:

IT IS HEREBY ORDERED THAT the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation are approved with the following modifications:

¶ 90 • Dishonest and selfish motive: As set forth in paragraph 56, Respondent described in a letter and in a deposition efforts that he had undertaken to find responsive billings, which efforts likely would have resulted in his finding them.

Respondent either misrepresented the extent of his efforts to find responsive bills, or

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0060

he willfully failed in his duty to cooperate and to look for them.[1]

¶ 91 The evidence in the record establishes the mitigating factor of personal or emotional problems (ABA Standard 9.32(c).[2] Both experts testified that Mr. Poole suffered from bipolar disorder II and anxiety disorder, not otherwise specified, during the relevant time period. TR 863, 942, 943. Dr. Reichler testified that Mr. Poole's failure to provide all responsive documents to WSBA's July 2003 request was "certainly" related to his emotional and personal problems at that time. TR 871. Dr Reichler also testified as follows:

> Q: Can we say that the bipolar disorder is causing the problem?
>
> A: Well, you focused only on bipolar disorder. I think it's a combination of that and, you know, his both being depressed and sometimes not paying attention to some of the details as well as an enormous amount of anxiety. So, I don't know, because I don't

[1] Original ¶ 90 stated: "Dishonest and selfish motive: As set forth in paragraph 56, Respondent described in a letter and in a deposition efforts that he had undertaken to find responsive billings, which efforts likely would have resulted in his finding them. Respondent either misrepresented the extent of his efforts to find responsive bills, or he willfully failed in his duty to cooperate and to look for them. *Moreover, as set forth in paragraphs 31, either Respondent's sworn testimony that the SO billing file was at least three volumes (coupled with his detailed description of its physical appearance) was unfounded or false, or his sworn declaration one month later that he could not locate volumes 1 and 2 was false. False or unfounded statements in these contexts are inherently dishonest.*" (italics added)

The italicized portion of the conclusion was stricken because Mr. Poole was not charged with falsely describing the SO billing file or falsely stating that volumes 1 and 2 of the file could not be found. This issue does not appear in the formal complaint and was not the subject of testimony at the hearing. The hearing officer appears to have raised this issue without any prior notice to Mr. Poole that he would need to defend an allegation that his statements were false.

[2] Original ¶ 91 stated: "Respondent argued that personal or emotional problems should be applied as a mitigating factor, but there was insufficient evidence regarding the timing and extent of those problems to overcome documentary evidence showing that Respondent was capable of understanding what was required of him and acting appropriately."

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know the specific events and the specific conditions under which they occurred, but certainly those kinds of things will occur with these underlying problems, yes. TR 900.

Dr. Andrea Jacobson testified as follows:

A: I can conclude on a more probable than not basis that the disorder of Bipolar Disorder II as described by Dr. Reichler in '03 with variable moodiness, some problems with impulse control early on, but continuing mood difficulties and anxiety disorder, that that could contribute to this, but to what degree I don't know. TR 956

A: These mental disorders have substantially contributed to the misconduct alleged. TR 982 (reading from report)

The record establishes personal or emotional problems that substantially contributed to the alleged misconduct. It is not necessary that Mr. Poole's personal or emotional problems caused his misconduct for this to be a mitigator. The Hearing Officer construed the mitigator too narrowly[3].

The Board recommends that the Court add a probation condition requiring Mr. Poole to continue treatment for his bi-polar disorder and follow all treatment recommendations during the probation period.

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The vote on this matter was 7-2

Those voting in the majority were: Carlson, Kuznetz, Lee, Romas, Cena, Andrews and Mosner.

Those voting in the minority were: Madden[4] and Fine.

Dated this 20th day of August, 2007.

Lawrence Kuznetz

Lawrence Kuznetz, Vice Chair
Disciplinary Board

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Adopting HO Decision to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer, ~~Respondent/Respondent's Counsel~~ at 710 Belmont W. 6th, Seattle, WA 98102, ~~by Certified/~~first class mail, postage prepaid on the 21 day of August, 2007.

Clerk/~~Counsel~~ to the Disciplinary Board

[3] ABA Standard 9.3(c) personal or emotional problems is a different mitigating factor than ABA Standard 9.3(i), mental disability or chemical dependency. Both experts testified that the combination of the bipolar disorder and the anxiety issues combined to contribute to Respondent's misconduct. The specific causality language found in ABA Standard 9.3(i)(2) is not found in 9.3(c).

[4] Madden would have approved disbarment.

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BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

JEFFREY POOLE,

Lawyer (Bar No. 15578).

Proceeding No. 05#00076

DISSENT

I agree with the Board's analysis concerning the aggravating factor of "dishonest or selfish motive" and the mitigating factor of "personal or emotional problems." I nonetheless dissent from the recommendation of a one-year suspension. The Respondent deliberately withheld information in response to a valid investigatory demand. As a result, a hearing officer was misled about the extent of the Respondent's improper practices and his attempts to correct them. This warrants a greater sanction.

In investigating a grievance, Disciplinary Counsel learned that the Respondent had billed at his current rates for work performed years earlier. To ascertain the extent of this error, she ordered the Respondent to provide "copies of all 2002 billing statements that include charges for work performed prior to 2001." Ex. 4. In response, the Respondent provided five invoices. In a cover letter and a subsequent deposition, he said that he had

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personally reviewed his billing files for each client that he had worked for during the relevant period. Ex. 5, 22.

At the hearing on the grievance, the Hearing Officer concluded that the Respondent's billing errors did not constitute ethical violations. She believed, however, that failure to correct the errors could be an ethical violation. Although she found a "disturbing delay" in making the necessary corrections, she decided that the Bar had failed to prove that the Respondent's corrective measures were inadequate. Ex. 112, ¶¶ 12, 19, 20.

Later, Disciplinary Counsel discovered that the Respondent had concealed the extent of his billing errors. When she was able to inspect his records, she discovered nearly 100 undisclosed invoices that appeared to be responsive to her request. Finding 12; ex. 14, 15.

The Respondent's attitude towards his disclosure obligations is illustrated by one of these invoices, for clients KC. Ex. 15, p. 287. This invoice was issued on January 24, 2002. It charged for work going back to 1995 – at his hourly rate for 2002. It thus falls squarely within Disciplinary Counsel's disclosure request.

The Respondent nevertheless testified that, if he had located the KC invoice, he would not have disclosed it. This is because KC were long-time clients and he "would not have just sent this one out." Tr. 770. His office used various markings to identify invoices that had not been sent out. Tr. 80; see ex. 15, pp. 313 (invoice marked "Hold"), 315 (invoice with date and invoice number crossed out). None of these appeared on the KC invoice. Rather, it was stamped "File." Furthermore, Disciplinary Counsel testified that, according to later invoices in the same file, the clients had paid this bill. Tr. 1105. Thus, the Respondent considers it proper to withhold a document that clearly appears to fall within the scope of a disclosure demand, based on his unsubstantiated and erroneous belief that the document had not been sent.

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This kind of attitude in litigation is a serious and continuing problem. Because attorneys fear this kind of grudging or deceptive response to their discovery demands, they broaden the demands and make them more intrusive. This greatly increases the cost and burden of litigation.

The Respondent's actions had not only this effect but a greater one. He succeeded in withholding the documents that were needed by the opposing party to discover information proving her case. Had the Hearing Officer known of the extent of the Respondent's billing errors, the outcome of the prior grievance proceeding may well have been different. The Respondent's deception may thus have resulted in a miscarriage of justice. This calls for a severe penalty. I would recommend a two-year suspension.

Dated this 20th day of August, 2007

Seth Fine
Disciplinary Board Member

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Dissent to be delivered to the Office of Disciplinary Counsel and to be mailed to Kurt Bulmer Respondent/Respondent's Counsel at 740 Belmont Pl E #3 Seattle WA 98102, by Certified/first class mail, postage prepaid on the 29 day of August, 2007.

Clerk/Counsel to the Disciplinary Board

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APPENDIX B

TO REPONDENT'S OPENING BRIEF

ORIGINAL

BEFORE THE DISCIPLINARY BOARD
OF THE WASHINGTON STATE
BAR ASSOCIATION

In re Jeffrey G. Poole, Lawyer (WSBA No. 15578)	PUBLIC FILE NO. 05#00076 **REVISED** FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter came on for hearing before the undersigned hearing officer on November 6-9 and November 13 and 14, 2006. Disciplinary Counsel Craig Bray represented the Washington State Bar Association ("WSBA"). Respondent Jeffrey G. Poole attended the hearing and was represented by Kurt M. Bulmer.

I. FIRST AMENDED FORMAL COMPLAINT

The First Amended Formal Complaint charged Respondent with the following acts of misconduct:

Count 1: By knowingly and/or intentionally failing to provide a complete response to ODC's July 24, 2003 request for information in the 2003 grievance and/or ODC's requests for the SO billing file, Respondent violated RPC 8.4(c) and/or 8.4(d).

Count 2: By failing to provide a complete response to ODC's July 23, 2003 request for information in the 2003 grievance, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

Count 3: During the course of his probation audit between April 2004 and June 2004, by failing to comply with the auditor's and ODC's requests for the SO billing file, Respondent violated RPC 8.4(l) by failing to comply with the terms of his probation (ELC 13.8).

Count 4: By failing to comply with ODC's request of July 6, 2004 for the SO billing file and/or ODC's demand by subpoena duces tecum dated August 25, 2004 for the SO billing file, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

Count 5: By failing to provide timely responses to one or more of ODC's requests for information in the 2004 grievance, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

Count 6: By failing to maintain an accurate SO client ledger between October 2002 and September 2003, Respondent violated RPC 1.14(b)(3).

Count 7: By failing to keep all client funds in trust between May 2003 and September 2003, Respondent violated RPC 1.14(a).

Count 8: By failing to provide accurate accounts to client SO regarding SO's trust account funds between October 2002 and September 2003, Respondent violated RPC 1.14(b)(3).

Count 9: By failing to pay, in a timely fashion, audit costs as required by the terms of his disciplinary probation, Respondent violated RPC 8.4(l), by failing to comply with the terms of his probation (ELC 13.8).

Count 10: On one or more occasions between June 2004 and December 2004, by failing to wait for deposited items to clear the banking system prior to disbursing funds from the trust account, Respondent violated RPC 1.14(a).

Count 11: On or about September 20, 2004, by failing to deposit an advance fee payment directly to his trust account, Respondent violated RPC 1.14(a).

II. FINDINGS OF FACT

The following facts were proved by a clear preponderance of the evidence.

All Counts

1. Respondent was admitted to practice law in the State of Washington on January 13, 1985 or 1986.[1] Prior to forming his own firm, he worked in the office of the United States Attorney and for a private law firm in which he became a partner after three years. Prior to forming his own firm, Respondent's experience was trying cases, not managing a firm or handling client funds.

2. Respondent and another lawyer formed their own firm in 1990, and from 1990 through 1995, the other lawyer had primary responsibility for the books and records of the firm. In 1995, the other lawyer left the firm, and Respondent became, and remains, the only principal in his firm.

3. Evidence of three prior disciplinary proceedings was presented at the hearing. They are referred to herein as the Matson Grievance, the Trust Account Case and the Moore Grievance.

[1] Respondent testified at Excerpt 4:16-17 that he was admitted in 1985. However, all other findings of fact in evidence (including those adopted by the Supreme Court in Ex. 74) state that he was admitted in 1986. It is likely that Respondent misspoke and meant 1986. (All citations to Respondent's hearing testimony is to page and lines (page:lines) from the electronic excerpt of testimony that was emailed to the hearing officer after the hearing).

4. Respondent has been continuously investigated by the WSBA since at least July of 2002, when the Matson Grievance was filed. The Matson Grievance concerned, among other things, backdating an invoice and failing for eight months to properly account to a client for a disbursement. Ex. 74. The Matson Grievance resulted in a six month suspension, imposed by the Supreme Court in January of 2006. Id.

5. In March of 2003, Respondent testified in a hearing in which he was charged with improper trust account procedures ("Trust Account Case"). Ex. 3. Modified Findings and Conclusions in the Trust Account Case were issued in August 2003, and recommended a reprimand and probation with audits, both of which Respondent received. Ex. 1.

6. In 2003, the WSBA began investigating the Moore Grievance, which concerned, among other things, invoices sent to the Moores and other clients in 2002 that billed them for work done more than six months prior to the date of the invoice. The Moore Grievance resulted in a dismissal in January 2005. Ex. 112. The hearing officer in the Moore Grievance determined that a single decision (the decision to bill old time on 2002 bills) resulted in multiple, inadvertent errors in billings to five clients, but was not a violation of the Rules of Professional Conduct. Id.

7. The hearing officer in the Moore Grievance declined to find non-cooperation on the part of the Respondent on the ground that most responses to the Office of Disciplinary Counsel ("ODC") were handled by his counsel. Ex. 112 at p. 6. In March of 2006, the parties entered into a stipulation to the effect that, in this case, Respondent's conduct would not be attributed to actions, inactions or advice by Respondent's counsel.

Counts 1 and 2: July Request and Production of 2002 Bills with Old Time

8. The mistake on the Moore billings and the investigation of the Moore Grievance should have resulted in Respondent's scouring his files for all such billing errors so that he could make things right with his clients, ***regardless of ODC requests for such billings***.

9. Moreover, in order to contend in the Moore Grievance hearing that he had found and corrected his inadvertent mistakes, Respondent either found all bills with old time, or he failed or refused to look for them.

10. Respondent produced bills from the files of only six clients in time for the Moore Grievance hearing. Ex. 112. The following facts show that there should have been *at least* 29 additional bills provided to ODC prior to the Moore Grievance hearing.

11. On July 24, 2003, ODC issued a letter requesting 2002 billing statements that included (i) charges for work performed prior to 2001 and (ii) charges for work performed in 2001, when that work was performed at least six months prior to the date of the billing statement ("July Request"). Ex. 4. The July Request unambiguously sought 2002 bills that charged clients for work performed more than six months prior to the date of the bill.

12. After the hearing in the Moore Grievance, but before the hearing in this matter, ODC discovered nearly 100 additional 2002 billing statements that contained charges for time more than six months old. Exs. 14 and 15. The WSBA and Respondent disputed whether these bills had or had not been sent to clients, apparently agreeing that only bills that had been sent to clients were sought by the July Request.

13. Bills in Exs. 14 and 15 were not produced until March of 2006, under the hearing officer's order permitting ODC to inspect Respondent's files.

14. Respondent admitted the possibility that he had not produced bills that were responsive to the July Request. E.g., 241:23-242:4:

> Q. Is it possible, Mr. Poole, that in reviewing billing statements in September of 2003 that there might have been bills which were indeed responsive to the Bar Association's request which you should have identified but you didn't by mistake?
>
> A. Yeah, sure, I may have made a mistake in going too fast. I could have made a mistake, sure.

15. The parties agreed that bills in Ex. 14 were found in Respondent's computer, but that not all of them were found in hard copy in client billing files. With the exception of bills that also are found in Ex. 15, and the Kennedy bill at Ex. 14, bates no. 000120, the evidence is insufficient to establish which of the bills in Ex. 14 were printed out of the computer and sent to clients. Client Kennedy credibly testified that he received the bill at bates no. 000120. Bills in Ex. 15 are addressed below.

16. With regard to the bills in Ex. 14, ODC witness, Christine Gray testified that she saw in Respondent's original files later bills (outside of the scope of the July Request) that proved that the bills in Ex. 14 had been sent to the clients. Upon realizing their significance, ODC asked Respondent to voluntarily produce, but did not compel production of, copies of those later bills. Respondent declined to again produce those bills. At the hearing, Respondent attempted to use some of those later bills to refresh his recollection that the bills in Ex. 14 had ***not*** been sent to clients. The WSBA's motion to exclude use of or reference to ***selected*** later bills was granted, on the ground that Respondent had declined ODC's request that he produce all of them. Without those later bills, the evidence was inconclusive as to whether most of the bills that were found in Respondent's computer, but not in the client billing files, were or were not sent to clients.

17. The WSBA did not prove by a clear preponderance of the evidence that all of the bills in Ex. 14 were sent to clients. However, having carefully considered Respondent's speculative and sometimes impeached testimony regarding why he "would not have sent" certain bills, the large number of detailed bills that were found in the computer but not in billing files, and the large number of obviously responsive bills that were not produced in response to the July Request, the hearing officer concludes that, although they cannot be identified or quantified, some of the bills in Ex. 14 were sent to clients and were responsive to the July Request.

18. The parties agreed that bills in Ex. 15 were found in hard copy in Respondent's client billing files in March of 2006. Respondent testified in this and prior proceedings that his practice was to send copies of bills that were sent to clients to the client billing files, and that bills found in the files probably were sent.

19. For example, Respondent testified:

> Q. What's the difference between the client file and the billing file?
>
> A. The billing file is where the bills go that actually go out to the client. It's not that every bill that gets run out goes in the billing file, ***it's only the bills that go out to the client get put in the billing file.*** (22:1-6)(emphasis added).
>
> ...
>
> A. And so other ones I looked in the file cabinet and found. And they were the ones that I had identified at the time that I could find and open the bill file up; ***there's the bill, it's there, it's in the bill file. I know it probably was sent.*** I wasn't a thousand percent sure but I know it probably was sent, okay, so those are the ones that I had produced. (160:20-161:2)(emphasis added).

Corroborating this testimony, most of the bills in Ex. 15 bear a "FILE" stamp.

20. Respondent also testified that many of the bills in Ex. 15 likely were not sent to clients. This testimony was based upon what he "would have done" knowing his own practice and procedures, not upon recollection, which he did not have. This testimony is not credible for two

reasons. First, it is at odds with the previously quoted testimony that if a bill was in the billing file, it likely was sent to the client. Second, the entirety of the testimony was rendered doubtful when some of it was impeached by documents. For example, Respondent testified that he "would not have sent" the client the January 2002 bill (Ex. 15, bates no. 000305) because the client was in bankruptcy. But Ex.83 shows that that client did not file for bankruptcy until March of 2002. It also shows that the client received the bill, because he listed the amount of the bill as disputed. Id.

21. With the exception of the JG bill at bates stamp 000313 in Ex. 15, which says "Hold" on its face, the bills in Ex. 15 were copies of bills that were sent to clients and that should have been produced in response to the July Request.

22. On September 11, 2003, Respondent wrote to ODC, "enclosing the billing statements that are responsive to the [July Request]." Ex. 5. In that letter he said that he had personally reviewed the billing files of the clients for whom he had worked in 2002 to look for time billed as set forth in the July Request. However, Respondent produced only five billing statements with that letter.

23. ***At least*** the following additional bills should have been but were not produced in response to the July [2003] Request:

- 17 bills in Ex.15, *produced* under hearing officer order *in March 2006*
- Bill to client JJ at Ex. 12, *produced in May 2005*
- Bill to client Kennedy, Ex. 14, *produced* under hearing officer order *in March 2006*
- 3 GB bills at Ex. 13, *produced* pursuant to subpoena (Ex. 9) *in December of 2003*
- 7 SO bills *produced in October of 2004* after Supreme Court Order to Show Cause re the SO billing file

Counts 1, and 3-5: SO Billing File, Probationary Audit and 2004 Grievance

24. The Trust Account Case required Respondent to cooperate with audits. Ex. 1, p 22. On April 24, 2004, the WSBA auditor wrote to Respondent raising certain issues with the SO trust account and asking for, among other things the entire SO billing file. Ex. 17. In the same month, Respondent wrote back inquiring why the entire file was relevant to the audit. Ex. 18. The auditor wrote back giving her reasons and requiring that any objection be in a writing setting forth its basis. Ex. 19.

25. On May 5, 2004, Respondent sent a letter purporting to answer the issues spotted by the auditor, but failed to state any objection or basis for an objection to providing the file. Ex. 20.

26. The SO billing file was relevant to the audit. In the spring of 2004, the auditor was questioning the $540 shortage on the SO ledger and a quick distribution to the firm of a large payment received from SO. She was not required to accept Respondent's explanation. She reasonably requested the billing file to see whether it supported or refuted Respondent's explanation.[2]

27. It may have been a questionable audit practice when the auditor later accepted ODC's representations about what the SO billing file revealed, rather than looking at the file herself, but that does not change the fact that the file was relevant to the audit.

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[2] By this time, Respondent's credibility regarding the contents of his own files and his ability to spot and correct errors in client accounts was seriously damaged. He had similarly resisted ODC's request for production of the entire GB file billing file in the investigation of the Moore Grievance. More than once he acknowledged, but failed to completely correct, billing mistakes in GB bills pointed out by ODC. Respondent gave ODC plenty of cause to doubt that he was completely and accurately correcting GB's account, but he would not provide the file, E.g., Ex.8. Ultimately, ODC got the file with a subpoena duces tecum, at which time it discovered three ***additional*** GB bills that were sent out in 2002 and that billed for old time. Ex. 13.

28. On May 21, 2004, ODC stepped in and explained the basis for the auditor's request for the SO billing file. Ex. 21. In June, ODC wrote a letter raising the possibility of a new grievance if the file was not produced. Ex. 23. Emails then were exchanged about the proper forum for resolution of the scope of the request by the auditor. Ex. 25. Ultimately, the Respondent produced the file rather than appear before the Supreme Court on a petition for interim suspension for non-cooperation and show cause order. Ex. 35. Accordingly, ODC withdrew the petition. Ex. 37.

29. Prior to petitioning the Supreme Court for Respondent's interim suspension, ODC opened the 2004 Grievance regarding the SO billing file and a shortage in the SO trust account. Ex. 27. Respondent did not respond. ODC sent a ten day letter under ELC 5.3(e) requiring a response. Respondent did not respond. Ex. 28. On August 25, 2004, ODC sent a subpoena duces tecum requiring Respondent's attendance at a deposition (Ex. 29), which deposition took place on September 15, 2004. Ex. 31.

30. At the deposition, Respondent articulated for the first time his objection to producing the SO file. (It was large and pertained to many years). He testified with great certainty that the SO billing file was "at least three volumes, approximately four inches, three to four inches apiece." Ex. 31, p.12. **The day after the deposition, Respondent moved for a protective order from the Disciplinary Board, seeking protection from the WSBA's demand for "a file consisting of several volumes and covering many years." Neither of these grounds for objection could have been validly asserted with regard to Volume 3 of the SO billing file. Ex. 105, p.5.**

31. When ODC got the file through Supreme Court proceedings described above, it got only Volume 3. **Either the objections that Respondent had asserted in his deposition and motion to the Disciplinary Board were unfounded (i.e., not based upon his knowledge, information or belief formed after a reasonable inquiry) or he withheld Volumes 1 and 2 of the file.** It is inconceivable that two volumes of a file that had been so hotly contested and so specifically described under oath only a month earlier could have been lost just before it was required to be produced.[3] Notwithstanding, Respondent gave ODC a declaration, under penalty of perjury, that he did not find Volumes 1 or 2 of the SO file. Ex.109.

32. Respondent was still locating things that were or should have been in the SO billing file as late as the last day of the hearing in this matter. Specifically, Respondent produced a letter from his computer that detailed certain expenditures for client SO. Ex. 118. It bore the word processing notations at the bottom indicating that it had been created when Respondent said it was created, and it tended to corroborate Respondent's testimony that he frequently accounted to SO outside of the context of bills. However, whatever evidentiary benefit Respondent may have gained from that letter was destroyed by (i) its astonishingly late discovery and production and (ii) the fact that it was unsigned and never made it in hard copy form into the SO billing file that was produced to ODC.

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[3] The fact that Respondent knew where the entire SO file was located is further established by testimony that he gave at the hearing:

> The SO billing file was kept in a separate place. At that point it was three volumes. The first two volumes, like I say, were six to eight inches thick and they contained all sorts of materials in there; not just bills but letters, notes, this, that, personal memos, everything, because I didn't want -- ***I kept it in a separate place because I didn't even want the staff looking at some of this stuff***. (123:24-124:6) (emphasis added).

33. ODC sought other information from Respondent in the 2004 Grievance investigation. In December 2004 and February 2005, ODC sent a both a letter and an ELC 5.3(e) ten day letter requesting information, Exs. 50 and 51. Getting no response, ODC issued a subpoena duces tecum commanding Respondent's appearance and responsive documents at a deposition. Ex. 52. The deposition was canceled when, in February 2005, Respondent produced documents responsive to the December request. Ex. 53.

Counts 6-8: Client Funds and Accounting to Client

34. Respondent is trained in construction audits and has "done accounting malpractice," (120:18-121:6), which the hearing officer understood to mean that he has represented clients in accounting malpractice cases.

35. Volume 3 of the SO billing file showed that Respondent failed to accurately account to SO for expenditures made in October of 2002 until an October 23, 2003 bill. Ex. 40.

36. The October 23, 2003 bill corrected a transposition error of $540 that had been made in October of 2002. That error resulted in a $540 shortage in Respondent's IOLTA account in May of 2003, but the error was not discovered until September of 2003.

37. Throughout the period of the error, Respondent maintained two ledgers for SO, a handwritten one and a QuickBooks one. The handwritten ledger contained the transposition error on the Dean Moburg check. Ex. 66. The QuickBooks ledger was correct. Ex. 67, p. 8.

38. Respondent testified several times that he reviewed reconciliations provided to him by his employee. He testified that this employee provided false reconciliations and that he fired her for it. (E.g., 110:15-112:1). However, given Respondent's familiarity with construction audits and his handling of accounting malpractice cases, and the Trust Account Case hearing in March of 2003,

in which he learned so much, Respondent knew or should have known that his handwritten ledger did not match his computer ledger and that, in any case, the bank statement did not match the information that he was relying upon to disburse funds.

39. Because SO did not have sufficient funds in the trust account to cover expenses that were paid on its behalf from that account, funds of other clients were improperly used.

Count 9: Payment of Audit Costs

40. On July 22, 2004, Respondent was billed $800 for audit costs for which he was responsible. Ex. 41. Respondent did not pay the audit costs until December 10, 2004. Ex. 48. Between July and December, ODC sent three letters regarding audit costs and received no response from Respondent. Exs. 42, 43 and 46.

41. On May 19, 2005, Respondent was billed $100 for audit costs for which he was responsible. Ex. 54. On July 20, 2005, ODC sent Respondent a reminder, Ex. 57, and he paid the $100 on or about July 26, 2005.

42. On November 3, 2005, Respondent was billed $175 for audit costs for which he was responsible. Ex. 58. ODC sent out two reminder letters. Exs. 59 and 60. Respondent paid the $175 on or about February 2, 2006.

43. The WSBA lost one check that Respondent sent in payment of audit costs, and Respondent testified that he believed that he had sent one payment that he had not in fact sent. Although he was not prompt in making payments, there were errors and misunderstandings on both sides. The evidence did not establish that Respondent violated any order or rule requiring him to pay audit costs by a date certain.

Count 10: Disbursals from Trust Account Before Funds Collected By Bank

44. In August of 2003, modified findings and conclusions in the Trust Account Case held that on several occasions, Respondent had violated his ethical duty by disbursing funds without waiting for them to be collected by the bank. Ex. 1.

45. Respondent received an audit report dated June 28, 2004 in which he was reminded of his duty under RPC 1.14(a) to wait for funds to be collected before disbursing them. Ex. 26.

46. On June 21, 2004, Respondent deposited a check in the amount of $2,000. On June 24, 2004, Respondent issued a check out of those funds in the amount of $1,526.62. The $2,000 check was returned by the bank for insufficient funds. Ex. 61. Where, as here, funds belonging to a client are insufficient to cover disbursals on its behalf, the funds of other clients are improperly used.

47. On December 30, 2004, Respondent deposited a check in the amount of $3,483.47. The next day, drawing upon those funds, he issued a check in the same amount, which did clear the bank. Exs. 64 and 65.

48. Respondent testified repeatedly that he had learned a lot from the hearing officer in the Trust Account Case, who counseled him to obtain a WSBA booklet about the handling of trust accounts and to talk to his bank about when it collects deposits. Upon his inquiry, Respondent's bank informed him that cash was "collected" immediately, and that other kinds of checks were collected in various amounts of time. The WSBA booklet upon which Respondent relied was not made an exhibit. But Respondent read this portion of it into the record:

> ..."The only items," it says: "Do not confuse collected funds with available funds. Federal Reserve Regulation CC requires banks to make funds available for withdrawal frequently before they are collected funds." (66:9-13).

49. In regard to disbursal of funds from his IOLTA account after the hearing, Respondent testified that, after checking with his bank, he distinguished between checks based upon their reliability as viewed by his bank. However, he placed his greatest reliance on the "available balance" reported by his bank, thereby confusing "available balance" with collected balance as the quoted booklet told him not to do. (E.g., 283:1-18).

Count 11: Credit Card Deposit

50. The audit report dated June 28, 2004, informed Respondent that advance fees paid by credit card were required by RPC 1.14(a) to be deposited directly into the trust account. Ex. 26, bates no. 000214.

51. On or about September of 2004, Respondent accepted a $1,464.15 advance fee credit card payment, which went into a money market account. Respondent promptly transferred the funds to his IOLTA account.

52. The evidence is insufficient to establish whether the money market account was itself treated as a trust account. Documentation of this account would have been responsive to the auditor's request for information concerning all of Respondent's trust accounts, but Respondent could inadvertently have overlooked the money market account that was used to accept, but not hold, credit card payments. Respondent no longer accepts credit card payments.

Respondent's Personal or Emotional Problems

53. Two qualified experts testified that Respondent suffers from Bipolar I. Both experts testified that Respondent's condition varied in symptoms and severity over the relevant time period, and neither could pinpoint the symptoms that Respondent may have suffered at a time when misconduct was alleged to have occurred. Nonetheless, the WSBA's expert testified that Respondent's mental disorders "substantially contributed to the misconduct alleged."

54. There is no evidence that, but for Respondent's condition, the misconduct alleged would not have occurred, nor is there evidence that he has recovered.

55. Respondent demonstrated his understanding of what was being asked of him, and his capacity (if not willingness) to understand what was sought respond appropriately. See, e.g., Respondent's September 11, 2003 response to ODC, Ex. 5.

Mental State

56. Respondent's principal defense to the non-production of responsive bills was "inadvertent oversight." However, Respondent's bills to clients were not hard to find, and there were too many instances of non-production for this to be a credible defense. Respondent described in a letter (Ex. 5) and in a deposition (Ex. 103, pp. 41-43), efforts that he had undertaken to find the bills that likely would have resulted in his finding them. Respondent either misrepresented the extent of his efforts to find responsive bills, or he willfully failed in his duty to cooperate and to look for them.

57. Since Respondent's conduct regarding the non-production of responsive bills was more than merely negligent, the question is whether it was *intentional*, (having a conscious objective or purpose to accomplish a particular result), or whether it was *knowing* (an awareness of the nature

or attendant circumstances of his failure to provide responsive bills, but a lack of conscious objective or purpose to accomplish a specific result).[4] The question is a close one. On the one hand, the sheer number of unproduced bills points to intent, such as an intent to avoid discipline in the Moore Grievance, or to keep ODC away from certain clients. On the other hand, the production of additional bills has not given rise to additional claims of errors in billing old time, nor was there any pattern in the kinds of clients Respondent did or did not reveal in his response to the July Request.

58. After careful consideration of the evidence, including Respondent's testimony and demeanor, the hearing officer concludes that Respondent knowingly failed to provide bills that were responsive to the July Request. Specifically, he was aware of the nature or attendant circumstances of his failure to look for and/or produce responsive bills, and he did so without the conscious objective or purpose to accomplish a particular result.

59. Respondent's principal defense to the non-production of the SO file was that he had a legitimate basis for objecting to the production of a file dating back many years. But if he did, he failed to timely and properly assert it. Moreover, either the objection was **made without looking at the file or it was** untrue, or Respondent's declaration stating that he could not find two volumes was untrue.

60. Once again, no logical design can be discerned from Respondent's refusal to produce the SO file. Volume 3, when it was produced, contained material that was both helpful and unhelpful to Respondent. The material that was unhelpful (bills that were responsive to the July Request) caused more trouble because of their non-production than because of their content. In the

[4] See ABA Standards for Imposing Lawyer Discipline, Definitions.

circumstances, the hearing officer concludes that Respondent knowingly declined to provide the SO billing file in response to the auditor's and ODC's reasonable requests for it.

61. Similarly, Respondent knowingly ignored December 2004 and later requests for information in the 2004 Grievance until February of 2005, when he was subpoenaed to appear at a deposition.

62. Respondent made a $540 transposition error in SO's account in the fall of 2002. As a result of that error, Respondent caused a shortage in SO's balance in his trust account in May of 2003. Respondent did not find the error and the shortage until September of 2003, but when he did, he promptly reported it to the client. The error and the failure to discover it occurred in the same time period during which Respondent was finding and then working with new staff to implement the things that he was ordered and counseled to do in the Trust Account Case. In the circumstances, the $540 error and Respondent's correction and reporting of that error were negligent.

63. Respondent has spent a great deal of effort to comply with trust account rules, and the hearing officer is mindful that no one will quantify for him the minimum number of days that a lawyer must wait for funds to clear the banking system before disbursing funds. But given what he learned from the Trust Account Case, the undersigned concludes that Respondent knew or should have known that his bank's statement of "available funds" was not the same as collected funds, and that he continued to disburse trust account funds too early.

Benefit to Respondent and Harm to Others

64. Far from benefiting him, Respondent's failure to respond to ODC, and his intransigence when he did respond, had the effect of putting him at the center of more investigations and legal proceedings.

65. Respondent's failure to respond to ODC, and his intransigence when he did respond, resulted in actual and potential harm to the disciplinary system as a whole, which depends upon lawyers' cooperation and honesty to function. It also caused actual and potential harm to ODC in the form of increased effort and costs, and potential harm to ODC's preparation for particular proceedings such as the Moore Grievance.

66. Use of $540 of other clients' funds to cover a disbursal for SO, and use of other clients' funds to cover a disbursal for the client whose $2,000 check bounced caused little potential, and no actual, harm to other clients.

67. Persisting in disbursing funds before the checks that covered them cleared the banking system caused little potential, and no actual, harm to clients. This is because most of the funds disbursed early were from the kinds of checks that are collected quickly. However, in one instance, disbursal was not from such a check, and the check bounced.

III. CONCLUSIONS OF LAW

68. The WSBA must prove each count in the First Amended Formal Complaint by a clear preponderance of the evidence. ELC 10.14(b). A clear preponderance is an intermediate standard of proof requiring greater certainty than simple preponderance, but not to the extent of the beyond a reasonable doubt standard. In re Disciplinary Proceeding Against Allotta, 109 Wn.2d 787, 792, 748 P.2d 628 (1988).

69. A hearing officer may give effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. ELC 10.14(d).

70. When an allegation of attorney misconduct is supported solely by circumstantial evidence, there is no requirement that the WSBA exclude or disprove alternative theories proposed

by the attorney; the WSBA need only produce facts from which only one reasonable conclusion may be inferred. In re Disciplinary Proceedings Against Guarnero, 152 Wn.2d 51, 61, 93 P.3d 166 (2004)(upholding hearing officer's rejection of improbable alternative explanations).

71. Regarding Count 1, by knowingly failing to provide a complete response to the July Request and ODC's request for the SO billing file, Respondent violated RPC 8.4(c), which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud deceit or misrepresentation and RPC 8.4(d), which provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

72. Regarding Count 2, by knowingly failing to provide a complete response to the July Request, Respondent violated RPC 8.4(l),[5] by failing to comply with his duty to cooperate under ELC 5.3(e). ELC 5.3(e) provides:

> **Duty to Furnish Prompt Response.** Any lawyer must promptly respond to any inquiry or request made under these rules for information relevant to grievances or matters under investigation. Upon inquiry or request, any lawyer must:
>
> (1) furnish in writing, or orally if requested, a full and complete response to inquiries and questions;
>
> (2) permit inspection and copying of the lawyer's business records, files, and accounts;
>
> (3) furnish copies of requested records, files, and accounts;
>
> (4) furnish written releases or authorizations if needed to obtain documents or information from third parties; and
>
> (5) comply with discovery conducted under rule 5.5.

73. An attorney violates ELC 5.3(e) by failing to respond to a request for information relevant to matters under investigation. In re Discipline of DeRuiz, 152 Wn.2d 558, 99 P.3d 881

[5] RPC 8.4(l) provides that it is professional misconduct for a lawyer to violate a duty or sanction imposed by or under ELC.

(2004)(suspending lawyer for, among other things, violating former RLD 2.8, now ELC 5.3). ELC 5.3(e) requires a prompt and complete response. It also requires the lawyer to permit inspection and copying of requested files and records.

74. Respondent is correct that ELC 5.3(c) requires prompt and complete responses to requests for information ***relevant to matters under investigation***. However, his failure to articulate a relevance objection and to take affirmative steps to resolve a dispute over relevancy left Respondent in the position of continuing to assert it at the risk of a later determination that the information was relevant, and that failure to provide it violated ELC 5.3(e).[6] In fact, the SO billing file proved to be relevant.

75. Regarding Count 3, by knowingly failing to comply with the auditor's and ODC's requests for the SO billing file, Respondent violated RPC 8.4(l) by failing to comply with the terms of his probation under ELC 13.8. ELC 13.8 provides:

> ... Failure to comply with a condition of probation may be grounds for discipline and any sanction imposed must take into account the misconduct leading up to the probation.

76. Regarding Count 4, by knowingly failing to comply with ODC's request of July 6, 2004 for the SO billing file and ODC's demand by subpoena duces tecum dated August 25, 2004 for the SO billing file, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

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[6] Such a step might have included objecting earlier, before the ODC had spent so much time and effort trying to get the file, and while it might have been willing to compromise. Another step might have been to proceed with the show cause hearing before the Supreme Court. Respondent says that he feared the lack of a ten day window for compliance before suspension if he lost. ODC says, and the record supports, that he never asked for such a window.

77. Regarding Count 5, by knowingly failing to provide timely responses in the investigation of the 2004 Grievance, Respondent violated RPC 8.4(l), by failing to comply with his duty to cooperate under ELC 5.3(e).

78. Regarding Count 6, by negligently failing to maintain an accurate SO client ledger between October 2002 and September 2003, Respondent violated RPC 1.14(b)(3), which requires a lawyer to "maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them."

79. Regarding Count 7, by negligently failing to keep all client funds in trust between May 2003 and September 2003, Respondent violated RPC 1.14(a), which requires that all funds of clients paid to a lawyer "shall be deposited into one or more identifiable interest-bearing trust accounts maintained as set forth in section (c)...."

80. Regarding Count 8, by negligently failing to provide accurate accounts to client SO regarding SO's trust account funds between October 2002 and September 2003, Respondent violated RPC 1.14(b)(3).

81. Count 9, regarding payment of audit costs, was not proved by a clear preponderance of the evidence.

82. Regarding Count 10, by knowingly disbursing funds before deposited items cleared the banking system, Respondent violated RPC 1.14(a).

83. Count 11, regarding credit card payments, was not proved by a clear preponderance of the evidence.

IV. SANCTIONS ANALYSIS

84. The ABA Standards for Imposing Lawyer Sanctions provide the framework to impose disciplinary sanctions. In re Halvorson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). The Standards set out four factors to be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. Mental state and actual or potential injury are set forth in separate sections in the foregoing Findings of Fact.

Duties Violated and Presumptive Sanction

85. Knowing failure to completely and honestly respond to ODC requests and cooperate with ODC investigations were violations of duties owed to the legal system and of duties owed as a professional. ABA Standard 6.12 applies:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material is being improperly withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

ABA Standard 7.2 also applies:

> Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

86. In imposing a sanction of suspension in In re Disciplinary Proceedings Against Clark, 99 Wn.2d 702, 708, 663 P.2d 1339 (1993), the Court stated that "an attorney who disregards his professional duty to cooperate with the bar association must be subject to severe sanctions."

87. To the negligent $540 transposition error, and negligence in the discovery, correction and reporting to the client of that error, ABA Standard 4.14 applies:

> Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury or potential injury to a client.

ABA Standard 4.64 also applies:

> Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information and causes little or no actual or potential injury to the client.

88. ABA Standards fail to address the knowing disbursal of funds prior to their clearing the banking system in circumstances where there was little or no actual or potential injury to the client. The following Standards are relevant:

> 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury or potential injury to a client.
>
> 8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system or the profession.
>
> 8.3 Reprimand is generally appropriate when a lawyer:
>
> (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
> (b) has received an admonition for the same or similar misconduct that cause injury or potential injury to a client, the public the legal system, or the profession.

Where, as here, the conduct is knowing, but the element of injury is absent, the presumptive sanction is not suspension, but the knowing state of mind is significant. See In re Disciplinary Proceedings Against Poole, Slip Op., Ex. 74, pp. 10-11 of 17. In the circumstances, the hearing officer concludes that reprimand under ABA Standard 8.3 is the presumptive sanction.

89. The "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations...." In re Disciplinary Proceedings against Petersen, 120 Wn.2d 833,854, 846 P.2d 1330 (1993). In this case, the presumptive sanction is suspension.

Aggravating or Mitigating Factors

90. The following aggravating factors apply:

- Prior disciplinary offenses: Respondent received a reprimand and two years probation for violations involving his trust account. Ex. 1. Respondent was suspended for six months for not rendering proper accounts and for submitting a falsified document in a legal proceeding. In re Disciplinary Proceeding Against Poole, 156 Wn.2d 196, 125 P.3d 954 (2006).

- Dishonest or selfish motive: **As set forth in paragraph 56, Respondent described in a letter and in a deposition efforts that he had undertaken to find responsive bills, which efforts likely would have resulted in his finding them. Respondent either misrepresented the extent of his efforts to find responsive bills, or he willfully failed in his duty to cooperate and to look for them. Moreover, as set forth in paragraph 31,** either Respondent's sworn testimony that the SO billing file was at least three volumes (coupled with his detailed description of its physical appearance) was **unfounded or** false, or his sworn declaration one month later that he could not locate volumes 1 and 2 was false. False **or unfounded** statements in these contexts are inherently dishonest.

- Pattern of misconduct: Respondent exhibited a pattern of misconduct in his refusal to respond in ODC investigations.

- Multiple offenses: Respondent has violated more than one rule with more than one kind of conduct.

- Refusal to acknowledge wrongful nature of the conduct: This aggravator is properly applied when the lawyer does not deny that he engaged in the activity in question (here, refusing to provide the SO file and disbursing funds from the trust account too soon), but instead argues that the activity was not wrongful. In re Disciplinary Proceeding Against Kronenberg, 155 Wn.2d 184, 196, n. 8, 117 P.3d 1134 (2005).

- Substantial experience in the practice of law: Respondent has practiced law in Washington since 1986.

91. Respondent argued that personal or emotional problems should be applied as a mitigating factor, but there was insufficient evidence regarding the timing and extent of those problems to overcome documentary evidence showing that Respondent was capable of understanding what was required of him and acting appropriately.

92. Finally, Respondent argued that remorse should be applied as a mitigating factor regarding the bills that he failed to produce, but Respondent did not demonstrate remorse for his conduct in this case.

V. RECOMMENDATION

Based upon the ABA Standards, and taking the foregoing aggravating factors into account, the hearing officer recommends that Respondent be suspended from practicing law in the State of Washington for one year, and that a two year probationary period (including periodic audits of his trust account) begin at the end of the period of suspension.

DATED this 22nd day of December, 2006.

Kimberly A. Boyce
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 22nd Day of December, 2006, a true copy of the foregoing pleading was served upon the following individuals:

VIA U.S. MAIL

Craig Bray
Disciplinary Counsel
Washington State Bar Association
1325 4th Avenue, Suite 600
Seattle, WA 98101-2539

Kurt M. Bulmer
Attorney
740 Belmont Pl. E #3
Seattle, WA 98102-4442

Also via U.S. Mail: Original to the Clerk of the Disciplinary Board and copy to the Chief Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Revised Findings
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Bulmer, Respondent/Respondent's Counsel
at 740 Belmont Pl E # 3, by ~~Certified~~/first class mail,
postage prepaid on the 29th day of December 2008

Clerk/Counsel to the Disciplinary Board

APPENDIX C

TO REPONDENT'S OPENING BRIEF

BEFORE THE DISCIPLINARY BOARD
OF THE WASHINGTON STATE BAR ASSOCIATION

In re JEFFREY G. POOLE, Lawyer WSBA #15578	Public No. 04#00012 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing before Nancy K. McCoid, hearing examiner, on January 18 and 19, 2005 at Seattle, Washington. Disciplinary Counsel Christine Gray represented the Washington State Bar Association. Kurt Bulmer represented Respondent Jeffrey G. Poole. Both sides presented witnesses and argument.

FORMAL COMPLAINT

The Second Amended Formal Complaint charged Mr. Poole with 10 counts of misconduct, involving 7 different clients: Steven Moore, PFC, AA, NC, CCI, GB, and Joyce Dearden. Counts 8 and 9, relating to Joyce Dearden, were dismissed by the Association because Ms. Dearden is ill and was therefore unable to attend the hearing. The remaining counts proceeded to hearing.

With the exception of the Dearden matter, all of the counts related either to billing errors which the Association conceded were a matter of mistake, not fraud, or of failure to notify clients of fee increases. There were no allegations of intentional misconduct or billing fraud, nor were

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there any claims that Mr. Poole did not perform the work for which he billed or that his hourly fees were excessive. Most of the facts were undisputed, with the parties disagreeing primarily about whether the alleged conduct rose to the level of an ethical violation.

Mr. Poole was charged with the following counts of misconduct:

Client Moore

Count 1: Charging client Steve Moore 2002 rates for work done from 1995-1997 in violation of RPC 1.5(a) and/or 1.5(b);

Count 2: Increasing the hourly rate to $225 without notifying Mr. Moore of the increase prior to its imposition in violation of RPC 1.5(a) and 1.5(b);

Count 3: Charging Mr. Moore in 2002 for work done in 1995 through 1997 on a matter completed long before the bill was sent out in violation of RCP 1.5(a).

Clients PFC, AA, NC, CCI, and GB

Count 4: Charging clients PFC, AA, NC, CCI and GB at 2002 rates for work done in earlier years when a lower rate was in effect in violation of RPC 1.5(a) and (b).

Count 5: Charging client GB more than once for the same work in violation of RPC 1.5(a).

Count 6: Increasing the hourly rates for clients PFC, AA and GB without first notifying them of the rate increase and failing adequately to notify the clients of the increased rates in violation of RPC 1.5(a) and (b).

Count 7: Charging clients AA, PFC and GB in 2002 for work done in 1998-2001 when the clients reasonably believed the prior invoices reflected all work done in those years in violation of RPC 1.5(a).

Client Dearden:

Counts 8 and 9: Dismissed by the Association

Count 10: Asking client Dearden to sign a letter which the Association contends was an attempt to prospectively limit malpractice liability in violation of RPC 1.8(h).

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FINDINGS OF FACT

To the extent that any Conclusions of Law, or Recommendations constitute Findings of Fact, they are incorporated herein.

All findings are based on the legal requirement that the burden of proving the allegations made in the Second Amended Formal Complaint rests with the WSBA and that it must prove its case by a clear preponderance of the evidence. ELC 10.14(b). The following facts were either admitted, agreed or proved by a clear preponderance of the evidence unless otherwise noted.

1. Respondent Jeffrey Poole was admitted to the practice of law in Washington in 1986. He is the sole principal in the firm of Poole & Associates which also employed at least one other attorney, Scot Marks, as well as a bookkeeper. At all relevant times, Mr. Poole was using Timeslips software, which was updated as newer versions became available.

2. Mr. Poole hired a new bookkeeper, Jody Hamrick, at an unspecified date. She purported to have expertise in the Timeslips program. The bookkeeper advised him that some time had gone unbilled in the past, apparently because date restrictors were used in the program so that some time was not included on the bills, even though it had not previously been billed. Ms. Hamrick was fired at an unspecified time and was not called by either side to testify at the hearing.

3. Mr. Poole instructed the bookkeeper to bill this "old time" after ensuring that a) the work had actually been performed and b) the work had not previously been billed.

4. Each client's bill contained the following notice at the end of the bill:

"Due to a recent accounts receivable audit, it has come to our attention that many clients have not been charged for Attorney's Fees and Cost Advanced. These charges will now appear on your bill for the first time. These amounts are due and owing. We apologize for any inconvenience. Thank you." (e.g. Ex. 62 at 149). Mr. Poole included this statement so that it would be clear that the "old charges" were on the bill and so that clients could call him if they had any questions or concerns about the "old" charges.

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5. Although Mr. Poole's bills did identify the timekeeper and the hourly rate for each line item at some time in the past, he changed the format so that the timekeeper and rate were not on the face of the bill at the suggestion of his bookkeeper. He offered no explanation for substituting the bookkeeper's opinion for his own when the bookkeeper presumably was not an attorney, but has now returned to including the hourly rate and timekeeper on the bills. Mr. Poole acknowledged that he bears ultimate responsibility for all such decisions as well as for any billing errors.

6. A client looking at the bill could not tell who performed the work and could determine the hourly rate only by calculating it from the time and dollars billed. This was not a difficult calculation, however, the clients who testified uniformly stated they had not done the calculation when they received the bills. They also testified they did not notice the "old charges" on their bills.

7. When the "old charges" went out, the computer program billed the charges at the current hourly fee instead of at the hourly fee applicable when the work was done. The parties agree that it was incorrect to bill at the current rate and that it was an inadvertent error rather than an intentional attempt to obtain more money from the clients. The Association submitted exhibits tallying the duplicate charges, charges over one year old and charges at the incorrect rate for clients GB (Ex. 63), AA (Ex. 65), PFC (Ex. 66), NC (Ex. 67), CCI (Ex. 68) and Moore (Ex. 69). Respondent did not challenge the accuracy of the numbers presented by the Association in these exhibits which the hearing examiner finds accurately state the dates and amounts to be found in the corresponding bills.

8. Mr. Poole attempted to raise his rates about once a year. He never sent written notices to the clients about rate changes. He testified that he had long-time clients with whom he talked frequently, and that they often discussed bills, including discussions of his hourly rates. He testified that these clients, primarily general contractors familiar with rising labor and materials costs, would acknowledge that they could not make money in 2002 charging 1996

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rates, as evidence that they understood and accepted his need for increasing his rates. His clients never complained about his hourly rate. There was no evidence that the rates themselves were unreasonable.

9. Mr. Poole's recall of specific discussions with Mr. Moore about increasing his fee was variable. He originally testified in deposition that he could not recall a specific discussion with Mr. Moore about the rate increase, but testified at the hearing that he had reviewed documents that refreshed his recollection of meeting with Mr. Moore at a Starbucks in Edmonds, where he received a Quaker State box of documents, and where they discussed the rate increase. While it is unusual for a witness' recollection to improve with time, Mr. Poole offered a plausible explanation for his improved recall and the record does contain evidence of the 'box of documents' to which Mr. Poole referred. Mr. Moore's testimony on this point was not strong and Mr. Moore admitted to anger toward Mr. Poole about how his case turned out that could bias Mr. Moore's recall and testimony. The hearing examiner accepted Mr. Poole's testimony on this point.

10. G.B. also testified in person and was generally a credible witness. He did not recall discussions of rate increases with Mr. Poole, but admitted that "anything is possible" when asked whether the discussion could have occurred but been forgotten. Mr. Poole did not recall specific discussions about rates, but testified that it was his habit or practice to discuss the rates verbally with his clients and that he would have had such discussions with G.B. It appears that Mr. Poole had a close, ongoing, relation with his clients in which such informal discussions were common.

There was no testimony by the other clients about discussions--or lack thereof--on the bills. Mr. Poole testified that he recalled the discussions or as a practice would have discussed the rate increase with the clients.

11. The Association made various requests for information which were not always timely answered. Ex.70, Requests for Admission, details delays in responding to various

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requests for documents. Many of the requests were addressed to Respondent's counsel, Kurt Bulmer (e.g. Ex. 70, D, E, F, G, H and I). Any delay in responding to those requests should not be counted against Respondent. It appears that Respondent made efforts, although somewhat belated, to respond to extensive requests by the Association for information and did not attempt to withhold any information or documents requested by the Association. The Hearing Examiner understands the Association's apparent frustration at the extensive efforts needed to obtain documents, but does not believe that this type of discovery issue is indicative of ethical violations by respondent. There does not appear to have been any effort to conceal evidence or otherwise thwart the disciplinary process.

12. There was a somewhat disturbing delay in correcting the billing errors caused by billing the "old charges" at the new rates once those errors were brought to Mr. Poole's attention. He gave no explanation for these delays other than "I missed it" or "I blew it." He did correct the bulk of the billing errors as well as issuing "courtesy credits", but had discovered additional errors as late as the evening of the first day of the hearing which were yet to be corrected. The Association had not identified these "new errors". Mr. Poole could have refrained from mentioning them at the hearing, but chose to identify them which is evidence of a sincere effort to correct past billing problems.

13. The "old charges" went out on G.B.'s bill four different times. The GB billing file had copies of the printed bills. Simple comparison of the bills would have shown the duplicative charges. The Association conceded, however, that the duplicate GB billings were not intentional. Mr. Poole offered no explanation for failing to notice the multiple GB billings.

14. Mr. Poole represented Joyce Dearden in a dispute relating to re-roofing her home which was subject to a mandatory arbitration. The arbitrator ruled in Ms. Dearden's favor and the defendant requested a trial de novo. The matter was subsequently settled. There were numerous contacts between Ms. Dearden and Mr. Poole after the settlement, with Ms. Dearden

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apparently unhappy with the amount of the settlement and the bills and fees incurred in the matter.

15. Several letters were exchanged. Mr. Poole finally met with Ms. Dearden at his office on March 19, 2002. Ms. Dearden was accompanied by a friend, Peter Stake, who testified at the hearing. Mr. Stake testified that Ms. Dearden was very concerned about not receiving any further bills and would not agree to the settlement and sign the release until Mr. Poole guaranteed in writing that there would be no more bills from his office. Mr. Poole wrote words to that effect on a typed letter which Ms. Dearden then signed stating she was signing "under duress."

16. Exhibit 27 is the letter signed by Ms. Dearden on March 19, 2002 at Mr. Poole's office. Item number 8 of the letter states "You [sic] signature on this letter indicates your acceptance and agreement to the terms of this letter." The Association contends this is an attempt to limit malpractice liability. Mr. Poole testified that there was no discussion of malpractice, that he has drafted many releases and this would not be an effective release, and that he simply wanted it to be clear for himself and the client, who was difficult to deal with, that this was taking care of all outstanding matters. Mr. Poole's testimony on this point was credible and was accepted by the hearing examiner.

CONCLUSIONS OF LAW

17. With the exception of Count 10, all of the charges allege violations of RPC 1.5(a) and/or 1.5(b). This rule states:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

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(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(b) When the lawyer has not regularly represented the client, or if the fee agreement is substantially different than that previously used by the parties, the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

Rules Of Professional Conduct, RPC 1.5. The Association does not challenge the hourly rate or whether the work billed was actually performed. The Association contends that it is unreasonable to send a bill for work done 6 or more months earlier when the client reasonably believes that all bills for a particular matter have been paid.

18. The Association has not met its burden of proof of establishing by clear and convincing evidence that Mr. Poole charged an unreasonable rate by billing for work done six or more months prior to sending the bill. The work was done, the hourly rate was reasonable, and the work was inadvertently not billed due to a computer programming glitch. A delay in billing does not per se render the bill unreasonable.

19. The Association has not met its burden of proof of establishing by clear and convincing evidence that Mr. Poole charged an unreasonable rate because the computer issued bills using the current billing rates instead of the rates applicable at the time. This was a simple

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clerical or technical error, not an ethical issue. The Association argues essentially that RPC 1.5 is a strict liability rule and that any mistake in a bill is a violation of RPC 1.5. The Rule is not that draconian. A bookkeeping error should not be an automatic ethical violation. The Preamble to the Rules states in part:

> The Rules of Professional Conduct point the way to the aspiring and provide standards by which to judge the transgressor. Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Rules Of Professional Conduct, RPC Preamble. The Preamble, and the Rules themselves, make clear that the Rules are not a strict liability code intended mechanically to punish attorneys for administrative or clerical errors. The Rules are an aspirational guide for "the highest degree of ethical conduct" to preserve the integrity of the profession. That goal is not advanced by turning computer programming errors into automatic ethical violations.

20. Failure to correct a billing error once brought to the attorney's attention is another matter. That could well be an ethical violation. Here, however, Mr. Poole did attempt to correct errors brought to his attention. There was an outstanding $2.50 differential for AA (for "old charges" billed at the new rates). Mr. Poole testified that he believed that the time billed as "old work" was actually misbilled altogether and should have been billed under a contingent fee case for AA. Mr. Poole was handling two cases labeled "Foster" for AA and transferred a block of time improperly billed as hourly to the contingent Foster case. He believed this included the "old charge" so that AA was never required to pay that amount. The Association did not meet its burden of establishing by clear and convincing evidence that Mr. Poole failed to correct billing errors brought to his attention.

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21. RPC 1.5 (b) requires that the basis for the fee be communicated to the client within a reasonable time if a) the lawyer has not regularly represented the client or b) if the fee agreement is substantially different than that previously used by the party. The rule does not require that the fee be communicated in writing or in advance, stating that it may be communicated "within a reasonable time after commencing the representation." With the exception of Dearden, which does not involve a billing issue, the representations here were not new representations. The issue is therefore whether a $25 per hour increase is "substantially different" and must be communicated to the client. Most clients would likely consider this increase significant and would expect to be informed of the increase. Showing the increased amount on the bill is one way of informing the client, although not a particularly good method and one which was ineffective here given that Mr. Poole chose not to show the hourly rate on his bills. The better practice is undoubtedly to send a written notice in advance of proposed fee increases. Mr. Poole testified, however, that he verbally notified clients of increases. The evidence was evenly balanced on this issue for the claims involving Moore and GB, meaning the Association failed to meet its burden of establishing by clear and convincing evidence that Mr. Poole did not notify Moore and GB of the rate increases. No evidence was presented by the other clients in opposition to Mr. Poole's testimony. Mr. Poole's testimony therefore stands regarding those clients. There was simply insufficient evidence of failure to inform clients of routine fee increases.

22. Paragraph 8 of Exhibit 27 was not an attempt to limit malpractice liability. It is not a release, does not mention malpractice, and would not be effective in limiting malpractice liability. The letter simply set out the understanding between attorney and client in writing to avoid further frustration and misunderstanding. There was no violation of RPC 1.8(h).

AGGRAVATING AND MITIGATING FACTORS

23. The Association has failed to meet its burden of proof on all counts of the Second Amended Formal Complaint. Therefore, no discipline should be imposed and it is not necessary

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to consider mitigating and aggravating factors. However, should the ruling on one or more of the counts be reversed, the following aggravating and mitigating factors exist:

Aggravating factors:

a. Two prior, recent disciplinary offenses

b. Substantial experience in the practice of law

24. The Association urged that there were additional aggravating factors including a pattern of conduct, multiple offenses, dishonest or selfish motive and bad faith obstruction of the disciplinary process by intentionally failing to comply with rules and orders. The hearing examiner does not find that these would be aggravating factors.

25. There was essentially one act which led to almost all of the charges: the decision to bill previously unbilled time. Mr. Poole ensured that the work had been done and the time had not been billed. The incorrect and multiple billings were accounting errors, were not intentional, and were not motivated by greed or dishonesty as the Association itself conceded. The hearing examiner did not find any bad faith obstruction of the disciplinary process. The single decision to bill the old charges should not be considered a pattern of conduct simply because there were multiple clients affected by the single act.

26. Mitigating factors include restitution of misbilled charges with courtesy credits.

RECOMMENDATIONS

The Association did not meet its burden of establishing violations of the Rules of Professional Conduct by clear and convincing evidence, requiring that the charges be dismissed. However, it is troubling that Mr. Poole relied so extensively on non-lawyers (bookkeepers) and delegated his fiduciary responsibility of accurately and timely billing his clients to them. His repeated failure to detect and correct errors is also of concern.

To the extent he has not already done so, Mr. Poole should have an independent accountant review his files for billing errors and correct those errors and institute procedures and safeguards that will prevent further problems. It was not established at the hearing whether Mr.

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Poole proofreads his bills or whether he has any difficulties which would prevent him from detecting errors such as multiple billings. Mr. Poole should proofread the bills carefully and, if he has any problems that prevent him from reaching a higher level of accuracy, should have another attorney review them as well. Bills should identify the person performing the work and the hourly rate, and rate changes should be communicated in advance, in writing, for Mr. Poole's own protection as well as that of the client.

Dated: January 21, 2005

Nancy K McCoid

Nancy K. McCoid WSBA#13763
Hearing Examiner

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Findings of Fact
to be delivered to the Office of Disciplinary Counsel and to be mailed
to Kurt Bulmer, ~~Respondent~~/Respondent's Counsel
at 240 Belmont PLE Apt 3, by ~~Certified~~/first class mail,
postage prepaid on the 27th day of January, 2005.

~~Clerk/Counsel~~ to the Disciplinary Board

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